1. Whether the Board properly found and concluded that the object of the peaceful picketing was to compel exclusive recognition of a minority union.

2. Whether the evidence relied on by the Board in finding a recognition objective was competent, and not outside the scope of this record, or outside the six-months' limitation period prescribed by Section 10(b) of the Act.

3. Whether the Board could proerly conclude that the peaceful picketing in this case exerted or tended to exert economic pressure on the employer and his employees, and that such pressure, when exerted for the object set forth in question 1, violates Section 8(b)(1)(A).

4. Whether peaceful picketing is within the scope of Section 8(b)(1)(A).

5. Whether the picketing in this case constituted protected free speech under the First Amendment of the Constitution.

II

THE BRIEFS AND JOINT APPENDIX TO BRIEFS

1. Petitioner Local 639 will file and serve its opening brief on or before June 15, 1958. The Board will file its brief on or before August 1, 1958. Petitioner Local 639 shall file and serve its reply brief, if any, on or before September 1, 1958.

2. The Joint appendix shall consist of:

A. The following documents contained in the record heretofore certified herein:

i) Charge in Board Case No. 5-CC-59 (Exhibit 1A).

ii) Amended Charge in Board Case No. 5-C-190 (Post 5CC-59) (Exhibit 1C).

iii) Decision and Order of the Board and Intermediate Report of the Trial Examiner in Board Case No. 5-CB-190.

iv) Board order dated November 1, 1957 correcting Decision and Order in Board Case No. 5-CB-190.

v.) Complaint and Answer in Board Case No. 5-CB-190 (Exhibits Nos. 1-E and 1-M, respectively).

vi) Certification of Representatives in Board Case No. 5-RC-1325 (Exhibit No. 2).

vii) Letter to Regional Director Penello from L. A. Trainham, dated February 16, 1955 (Exhibit No. 3).

viii) Picket sign legends (Exhibits Nos. 4A and 4B, respectively).

ix) Board Decision and Direction of Election in Board Case No. 5-RM-281 (Exhibit No. 5).

x) Tally of Ballots in Board Case No. 5-RM-281 (Exhibit No. 6).

xi) Certificate of Results of Election in Board Case No. 5-RM-281 (Exhibit No. 7).

B. Such portions of the transcript of testimony in the aforesaid cases as may be designated by the respective parties, as provided below.

3. The parties will, on or before May 5, exchange designations as to the portions of the transcript of testimony to be printed in the joint appendix. The joint appendix, to be printed by a printer mutually agreed upon, will be filed with the petitioner's opening briefs, on or before June 15, 1958.

4. It is further agreed that any party and the Court, at or following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which has not been printed to the same extent and effect as if they had been printed, or otherwise reproduced, it

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 14,347

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, do hereby stipulate and agree as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and the contents of the joint apendix:

I

STATEMENT OF ISSUES

Whether the Board properly concluded that the Union's peaceful picketing, in the circumstances of this case, restrained and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended.

Subsidiary to the foregoing general question are the following more explicit questions:

being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

Dated this 9th day of April 1958, at Washington, D. C.

Counsel for Petitioner

Counsel for
NATIONAL LABOR RELATIONS BOARD

EXHIBIT 1A

Form NLRB-508 (7-52)

Form Approved
Budget Bureau No. 64-R003.5

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Charge Against Labor Organization or Its Agents

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: *File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

Do Not Write in This Space

Case No.: 5-CC-59

Date filed: 4/13/56

Compliance status checked by:

1. Labor Organization or Its Agents Against Which Charge Is Brought

Name: Drivers, Chauffeurs & Helpers Local Union No. 639.

Address: 1500 Thirteenth Street, N.W., Washington 5, D. C.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection(s) 1, 4A, 4B

of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the charge *(Be specific as to facts, names, addresses, plants involved, dates, places, etc.)*: 8(b)1 Since February 18, 1955 and at all times thereafter, the above-named labor organization, by its officers, agents, representatives and members, engaged in, or induced or encouraged the employees of Curtis Brothers, Inc., and Roadway Express, Inc., to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services where an object thereof is to restrain or coerce employees of said Curtis Brothers, Inc., in the exercise of the right guaranteed in Section 7 of the NLRA and 8(b)(4)(A) since September 11, 1955 where the object is to prevent M. S. Cladny Construction Company, Inc., employees and subcontractors from transporting, dealing with or doing business with Curtis Brothers, Inc., and particularly attempting to prevent performance of a building contract which said M. S. Cladny Construction Company, Inc. has with said Curtis Brothers, Inc. and 8(b)(4)(B) where an object thereof is to force or require Curtis Brothers, Inc., to recognize or bargain with the Drivers, Chauffeurs & Helpers Local Union, a labor organization as the representative of the employees of the said Curtis Brothers, Inc., although the said Drivers, Chauffeurs & Helpers, has not been certified as the representative of the employees of said Curtis Brothers under the provisions of Section 9 of the Act in fact it has by disclaimer and by a vote of 28 to 1 among the employees of Curtis Brothers, Inc., been decertified.

On Wednesday, April 4, 1956, Charles Fagan, Union Shop Steward of Roadway Express, Inc., driving a delivery truck to Curtis Brothers, Inc., upon seeing L. A. Trainham,

Recording Secretary of the Drivers, Chauffeurs & Helpers Local Union No. 639, with his pickets at the premises of Curtis Brothers, Inc., refused to deliver a rug cleaning machine to Curtis Brothers, Inc., because he feared reprisal from Mr. Trainham or his Union. Said Charles Fagan phoned the dispatcher on duty at Roadway Express, Inc., and told him that Trainham and his pickets were at Curtis Brothers, Inc., and he was not going to make the delivery because, "He wasn't going to stick his neck out."

He returned with his truck to Roadway Express, Inc., and Curtis Brothers, Inc., was unable to obtain delivery by Roadway Express, Inc., of the machine needed in its rug cleaning business. Thereafter, Harry E. Taylor, Jr., attorney for Curtis Brothers, Inc., phoned the dispatcher and was informed that he believed there has been a strike at Curtis Brothers, Inc., for the past two years, and that he would not "stick his neck out" by making his drivers cross the picket line to make deliveries.

The Teamster's Union has deliberately and in bad faith continued to strike to force Curtis Brothers, Inc. and its employees to join it against the will of the company and its employees. The Teamsters officials have not and will not make it clear that a strike does not exist at Curtis Brothers, Inc., and as a result it is interferring with the operation of the business and the work of its employees. The Teamster's officials will not inform members of its Union or other Unions, that it is not on strike, but will only tell members who inquire as to whether or not they should cross the picket line that they will have to "use their own judgement." As a result of this underhanded policy pursued in bad faith by Mr. Trainham and his Union, individual members of the Union are afraid to cross the picket line at Curtis Brothers, Inc., for fear of a fine or other penalty that might be imposed by their Union or loss of employment. Although the Teamsters claim that the pickets are for organizational purposes, it is obvious that to obtain their removal Curtis

Brothers, Inc., must force its employees to join the Teamsters and then enter into a Union contract agreement which is satisfactory to the Teamster's Union, all of which is in violation of the above enumerated sections of the National Labor Relations Act. (The use of the word Teamsters herein indicates Drivers, Chauffeurs & Helpers Local Union No. 639.)

3. Name of employer: Curtis Brothers, Inc.

4. Location of plant involved *(Street, City, and State)*: 2041 Nichols Avenue, S.E., Washington, D. C.

5. Type of establishment *(Factory, mine, wholesaler, etc.)*: Furniture & Moving & Storage.

6. Identify principal product or service: Furniture, Moving & Storage.

7. No. of workers employed: 30.

8. Full name of party filing charge: Curtis Brothers, Inc.

9. Address of party filing charge *(Street, City, and State)*: 2041 Nichols Avenue, S.E., Washington, D. C.

10. Tel. No.: LU 4-4000.

11. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Harry E. Taylor, Jr.
(Signature of representative or person making charge)
Attorney for Curtis Brothers, Inc.
(Title or office, if any)

4/11/56
(Date)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

GPO 83-37998

EXHIBIT 10

Form NLRB-508 (7-52)

Amended

Form Approved
Budget Bureau No. 64-R003.5

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Charge Against Labor Organization or Its Agents

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: *File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

Do Not Write In This Space

Case No.: 5-CB-190 (Post 5-CC-59)

Date filed: 5/14/56

Compliance status checked by:

I. Labor Organization or Its Agents Against Which Charge Is Brought

Name: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 639, AFL-CIO.

Address: 1500 Thirteenth Street, N.W., Washington 5, D. C.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection(s) 1(A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the charge *(Be specific as to facts, names, addresses, plants involved, dates, places, etc.):* Said labor organization, by its officers, agents and representatives, has since on or about February 18, 1955, and continuously since that time, and at all times thereafter, by picketing and other acts and conduct, restrained and coerced the employees of Curtis Brothers, Inc., and other employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Name of employer: Curtis Brothers, Inc.

4. Location of plant involved *(Street, City, and State)*: 2041 Nichols Avenue, S.E., Washington, D. C.

5. Type of establishment *(Factory, mine, wholesaler, etc.):* Furniture and moving and storage.

6. Identify principal product or service: Furniture, moving and storage.

7. No. of workers employed: 30.

8. Full name of party filing charge: Curtis Brothers, Inc.

9. Address of party filing charge *(Street, City, and State):* 2041 Nichols Avenue, S.E., Washington, D. C.

10. Tel. No.: LU 4-4000.

11. Declaration

I declare that I have read the above charges and that the statements therein are true to the best of my knowledge and belief.

By Harry E. Taylor, Jr.
(Signature of representative or person making charge)
Attorney for Curtis Brothers, Inc.
(Title or office, if any)

May 11, 1956
(Date)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

GPO 83-37998

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO and CURTIS BROTHERS, INC.	Case 5-CB-190 (Post 5-CC-59)

DECISION AND ORDER

On November 19, 1956, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in any unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Party filed exceptions to the Intermediate Report and supporting briefs, and the Respondent Union filed a brief supporting the Trial Examiner. In addition, the Board granted requests for permission to file briefs to the Chamber of Commerce of the United States, the American Retail Federation and the AFL-CIO. On May 2, 1957, the Board heard oral argument; the General Counsel, Curtis Brothers, and Local 639 participated.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error

[1] This case was consolidated for purposes of oral argument with *International Union of Operating Engineers, Local Union No. 12, AFL-CIO Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company and Mrs. Edwin Selvin, An Individual)*, Cases Nos. 21-CB-805, 21-CC-229.

was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The principal issue presented in this case raises a question of law involving the construction of Section 8(b)(1)(A) of the statute. The complaint alleges that a union's picketing for exclusive recognition by the employer when the Union in fact represents less than a majority of the employees coerces the employees within the meaning of that section of the Act and is therefore unlawful. On this broad question, the Trial Examiner was of the opinion that such conduct is in no event prohibited, and he therefore deemed it unnecessary to decide whether the object of the Respondent Union's picketing in this case was to obtain immediate recognition as exclusive bargaining representatives. He assumed the object to have been recognition, without regard to the evidentiary facts.

We disagree with the Trial Examiner's conclusion on the main issue of the case. Because one of the Union's defenses is that its object in picketing was only to win adherents and not to be recognized by the Company, this preliminary issue of fact must be decided now.

The Respondent Local 639 was certified by this Board in 1953 as the exclusive bargaining representative of Curtis Brothers' drivers, helpers, warehousemen and furniture finishers. An impasse was reached in the resultant bargaining and the Union started picketing the Company's premises early in 1954. This picketing has continued up to the time of the hearing in this proceeding in June 1956.

On February 1, 1955, the Company filed a representation petition, in which it questioned the Union's continued majority status and asked for an election.[2] About 2 weeks later,

[2] Case No. 5-RM-281.

on February 16, 1955, the Union filed a statement purportedly disavowing any current intention to represent the employees in their dealings with the Company. Before such disclaimer, the Union's picket signs read: "CURTIS BROTHERS ON STRIKE. UNFAIR TO ORGANIZED LABOR. DRIVERS, HELPERS, AND WAREHOUSEMEN OF LOCAL 639 (AF of L.)" Thereafter, they read on one side "CURTIS BROS. EMPLOYS Non-Union drivers, helpers, warehousemen, etc. Unfair to Teamsters Union No. 639 AFL," and on the other side "Teamsters Union No. 639 AFL wants employees of Curtis Bros. To Join them to gain union wages, hours and working conditions."

In September 1955, the Board directed an election in the representation case, finding that the Union was still seeking to win immediate recognition by the Company. The Board reasoned.

> . . . that the Union's current picketing activities cannot be reconciled with its disclaimer of interest in representing the employees in question. In the light of all the material facts of this case, including the certification of the Petitioner, the circumstances preceding the strike, the nature of the first signs carried by the pickets, the brief discontinuance of picketing, and its early resumption, we are convinced that the current picketing is not for the sole purpose of getting employees to join the Union, as the more recent picket signs indicate, but is tantamount to a present demand that the Employer enter into a contract with the Union without regard to the question of its majority status among the employees concerned. [citing cases] [3]

Twenty-eight employees voted against Local 639, and only one for it. As stated, the Union never altered its picketing activities. It is conceded that at no time after February 1955 did the Union represent a majority of the employees.

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[3] *Curtis Brothers, Inc.*, 114 NLRB 116, 117.

The underlying facts which led the Board to its factual conclusion on the object of the picketing before the losing election are equally pertinent and persuasive now. On this record, we conclude once again that the Union was at all times, up to the date of the hearing herein, seeking to win recognition by the Company. The picketing persisted without significant interruption from its inception, when the Union, as the certified bargaining agent, reached an impasse in bargaining; it went right on past the filing of the Employer's petition, and the colorable disclaimer; and it persisted similarly beyond the employees' almost unanimous rejection of the Union in a secret election. The only change in the character of the picketing was in the signs carried immediately after the disclaimer, and this, of course, was fully considered in the Board's earlier decision.

We deem it significant, even now, that while the Union assertedly sought nothing from the Employer, it simultaneously continued to publicize the fact that the Company employed non-union workmen and called the Company "unfair to Teamsters" for that reason. Such expressed dissatisfaction with the Company's position, however, harkens back to the Union's original dispute in the post-certification bargaining, for the record also shows that the strike resulted from the Union's failure to win its union security contract demands.

Accordingly, the record showing, as we find, that Local 639 represented only a minority of the Company's employees and that it nevertheless picketed for the purpose of compelling the Company to extend exclusive recognition to it, we reach the question whether such conduct is prohibited by the statute.

In pertinent part, Section 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agent . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7." In terms of the statutory language, therefore, our question is whether this

picketing *restrains* or *coerces* the employees in their free exercise of the rights guaranteed in Section 7. These latter "rights" expressly include the right of all employees "to bargain collectively through representatives of their own choosing."[4] If minority union picketing has a restraining or coercive effect upon the employees, and if such coercion cuts into their privilege to choose or reject any particular union, the only 2 essential elements of their unfair labor practice spelled in Section 8(b)(1)(A) have been established.

In support of the arguments for the defense, many contentions are urged: On the element of coercion, it is claimed that picketing as such is constitutionally protected, and that in any event, even if it does bring a compulsive pressure upon the Employer, it is not coercive upon the employees. On the second aspect of the issue—whether minority picketing coercion, if such it is, goes to the employees' right not to be represented by a union—it is argued that Section 8(b)(1)(A) was not intended to, or at least ought not be, read as it plainly reads.

It is now well settled that picketing, as such, is not in every instance a form of free speech protected by the Constitution. The Supreme Court has repeatedly so ruled in upholding the validity of state laws or court injunctions with respect to peaceful picketing for objectives declared illegal by state legislatures.[5] Although, as the Trial Exam-

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[4] In its entirety, Section 7 reads as follows: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[5] *Gibney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *International Brotherhood of Teamsters* v. *Hanke, et al.*, 339 U.S. 470; *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769; *Building Service Union* v. *Gazzam*, 339 U.S. 532; *Teamsters Local* v. *Vogt, Inc.*, U. S. Supreme Court, June 17, 1957, 40 LRRM 2208.

iner correctly commented, those cases did not arise under the proscriptive language of Section 8(b)(1)(A) of the National Labor Relations Act, they bear directly upon the Union's contention that its picketing was no more than talk. Thus, in the *Hanke* case, the Supreme Court said: "We must start with the fact that while picketing has an ingredient of communication, it cannot dogmatically be equated with constitutionality protected free speech. Our decisions reflect recognition that picketing is indeed hybrid." And in the *Wohl* case, the Supreme Court said: "Picketing by an organized group is more than free speech since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas being disseminated, hence those aspects of picketing make it the subject of restrictive legislation." In the *Vogt* case, the Supreme Court upheld the validity of a Wisconsin statute making it an unfair labor practice to picket peacefully to force an employer to recognize a union that did not represent its employees. The Supreme Court agrees with the state court that the picketing was "to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State," and goes on to say, "*For a declaration of similar congressional policy, see Section 8 of the Taft-Hartley Act, 61 Stat. 140, 29 U.S.C. Section 158.*" (Emphasis supplied.)

The realities of our industrial life lead inescapably to the fact that picketing by its very nature is a signal to all who may approach the picket line or who may work behind it. As the Supreme Court said, the very presence of a picket line may induce action of one kind or another "quite irrespective of the nature of the ideas being disseminated." In one case, the object of the picketing may be to prevail upon the employer to change his wage scale; in another to negotiate working conditions with the union instead of with his employees individually. In either event, the purpose of the

picketing is to exert a pressure upon the employer after attempts at oral persuasion have failed. But the pressure is necessarily an economic one, a device to reduce the business to the point where his financial losses force him to capitulate to the union's demands. It is immaterial whether the ostensible technique, or the unspoken but necessary consequence, is to cut off the employer's labor supply by preventing the employees from reporting to work; to keep the customers from buying his products; or to interrupt deliveries of supplies to the premises. The important fact of the situation is that the Union seeks to cause enonomic loss to the business during the period that the employer refuses to comply with the union's demands.

And the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid. There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendment of the words "restrain or coerce" to direct application of pressure by the Respondent Union of the employees. The diminution of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests.

There came a time during the picketing of the Curtis store when picketing at employees' entrances ceased and instead was ostensibly directed to consumers. Therefore, the Respondent attempts to distinguish this case from the Supreme Court decisions mentioned above; it contends that appeals to consumers have nothing to do with coercion of employees. The record as a whole shows that the picketing

was not confined to consumers only.[6] But even assuming, contrary to the record, that all picketing was aimed at consumers, its coercive effect upon the employees who desired to continue working was not thereby lessened. We are not concerned with whether or not the buying public is coerced in any way. The question still is whether the picketing damages the employees, and this is accomplished regardless of how the volume of business is reduced, by preventing deliveries or by preventing sales. If anything, the "consumer appeal" argument of the Respondent stresses all the more the economic coercion intended by the Union's picket line.

The Respondent Union also argues that there is "absolutely no evidence" that its picketing caused a loss of business to Curtis Brothers. It also asserts that the 28-1 vote *against* the Union after 18 months of picketing negates any possible inference of coercion. But success or failure of actions that tend to and are reasonably calculated to coerce is not the criterion upon which a finding of coercion is based. The Respondent Union, by advertising Curtis Brothers as "unfair" at least, by its own admission, to customers, was certainly attempting to hurt Curtis Brothers economically, and the fact that it may not have succeeded (the record is silent as to the possible effects of the picketing on Curtis Brothers' business) does not make the picketing any less coercive legally.[7]

Coercion alone, as stated above, is but one element of Section 8(b)(1)(A); the coercion becomes unlawful only if it goes to the employees' free exercise of their Section 7

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[6] Two witnesses testified to the effect that they saw pickets record license numbers of truckdrivers approaching the Company's premises, scratch marks on picket signs when customers entered the store, and talk to truckdrivers who would then refrain from entering the store. Although the Trial Examiner states that this testimony was "very general, vague and lacking in detail," he makes no credibility resolution in this respect. As the coercion here does not depend on this testimony, we, too, do not find it necessary to resolve this factual question.

[7] *N.L.R.B.* v. *Ford Brothers*, 170 F. 2d 735 (C.A. 6); *N.L.R.B.* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7).

rights. That the coercion effected by a minority unions' picket line aimed at obtaining exclusive recognition trenches upon the employees' freedom to accept or reject any union is too clear to require extended discussion. Indeed, the Respondent does not seriously dispute that if its picketing activity is coercive, Section 7 rights are involved and an unfair labor practice has been committed. There can be no more direct deprivation of the employees' freedom of choice than to impose upon them a collective bargaining agent they have not chosen or have expressly rejected. The facts of this case reveal a clear and literal violation of Section 8(b)(1)(A) and we so find.

The real burden of the Union's defense is that Section 8(b)(1)(A) may not be read or applied literally; that even if its conduct is a violation of the Section, there are reasons why it should be excused. In turn, this broad argument rests on contentions that our literal reading of the Section in this set of facts necessarily requires that other types of conduct, not now before us, must also be held unlawful, and that Congress did not intend that this Section be applied as we now do in this case.

On the first point, the Respondent misconceives the import of the issue decided here. We are considering and deciding only the legality of picketing with the unlawful purpose of foisting an unwanted union upon the employees. Picketing in other contexts, picketing for other purposes, picketing by majority representatives, present different questions which are not now before us, and this decision is not to be taken as prejudging the legality of union conduct not here litigated.

The Respondent nevertheless strongly argues that if other types of picketing, which may also fall literally within the language of Section 8(b)(1)(A), are not unlawful because the scheme of the statute as a whole so dictates, this picketing also must be tested in the light of other statutory provisions. Thus, it argues that the free speech Section—

10(c)—the right to strike Section—13—and the right to self-organization set out in Section 7 itself, all relates to the issue of this case.

In the course of the administration of this statute over the years, there have been cases requiring a balancing of the legitimate interests of various parties, either directly involved in the proceeding or affected by it.[8] As the Respondent correctly says, it is not always possible or proper to give literal effect to any one section of the law when, on its face, it seems to conflict with other explicit provisions. Because the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself,[9] and directly to deprive the employees of a right expressly guaranteed to them by the same Act, there is no occasion here to balance conflicting interests or rights.

Clearly, therefore, the Respondent's analogy between this case and a majority union's picketing for recognition, or to win economic demands, or in protest against unfair labor practices, is entirely mistaken. It has been said that there is no greater form of encouragement to membership in a union than granting it exclusive recognition.[10] Yet, in the case of a majority representative, the employer does not

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[8] See for example, the recent Supreme Court decision in *Buffalo Linen, Truck Drivers Local Union No. 449 v. N.L.R.B.*, 77 S. Cf. 43 where the Supreme Court unanimously ruled that

> "the Board correctly balanced the conflicting interests [of the employees in exercising their protected right to strike and the employer in preserving the multi-employer bargaining basis from distintegration] in deciding that a temporary lockout . . . was lawful." The Court went on to say: "the ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board subject to limited judicial review."

[9] *Sunbeam Corporation*, 99 NLRB 546, 550.

[10] See *International Metal Products Co.*, 104 NLRB 1076, for a direct holding that execution of an exclusive recognition contract with a minority union, with nothing more shown, constitutes a violation of Section 8(a)(2) and (1) of the Statute.

thereby violate Section 8(a)(1), which, read literally, protects the minority group also from interference with their right to reject any union. In conflict with the words of Section 8(a)(1), however, Section 9 declares that the majority union "shall be the exclusive representative of all the employees." Thus, unlike the Respondent here, a majority union has the right—indeed the duty—to represent *all* the employees. Concommitantly, considering the interrelated provisions of the statute, a minority of the employees do *not* have the right *not* to be represented by a union duly selected by a majority of their fellow workers. In fact, the legality of majority picketing for proper objectives is clear without the necessity of balancing conflicting interests or rights.

Equally inapposite to the case at bar is minority picketing for organizational purposes. In words, at least, such conduct falls within the statutory "right to self-organization" set out in Section 7 of the Act. More important, organizational picketing is not tainted, on its face, with the unlawful direct purpose of forcing the commission of an unfair labor practice by the employer and the summary imposition of an unwanted union upon its employees. At the same time, as explained above, minority picketing, even for organizational purposes, exerts a coercive force upon the employees who prefer to work. Such a case, therefore, may well require a balancing of the right to organize against the right to be free of restraint in the selection of a bargaining representative. That situation is not presented in this case and we do not pass upon it, but, as cases of conflicting rights arise, we shall undertake that "difficult and delicate responsibility" which is our duty in the administration of the statute entrusted to us.

As to the Section 13 "right to strike" provision, it has no relation to stranger picketing, which the minority union utilized in this case. But even assuming that the pickets were employees of the Curtis Company, our ultimate finding

would be the same.[11] Whether it uses employee union adherents or persons having no relation to the employer, to do the picketing, it is always the *Union's* conduct that is being judged. The identity of the pickets, whose individual action is not subject to statutory restraint, is irrelevant. We are concerned only with the right of the employees who are at work, and in either case, the unlawful coercion caused by the Union or its agents, who are responsible for the picketing, is the same.

And finally, even if we are to view this very case as the Respondent insists, in terms of balancing the rights of opposing parties, we could hardly emerge with a different conclusion. Merely by setting in their proper perspective the allegedly conflicting "rights" the question literally answers itself. On the one hand, we have the right of the employees to select representatives of their own choosing, free from restraint and coercion by labor organizations or by employers. On the other hand, we have the purported right of a union to seek representative status. But a union that does not represent the employees has no right to immediate recognition. If the employer were to grant exclusive bargaining status to a union which did not represent a majority, the employer would itself be violating the Act. Thus the Union here was attempting by coercion to cause the employer to commit an unfair labor practice. This is not the kind of activity that the Act intends to protect. The picketing by Local 639 here, in view of its object, is scarcely to be equated to the rights of the employees to be free of all forms of coercion and restraint. To subordinate whatever "right" there may be to picketing for an *unlawful* object, to the right of employees subjected to that picketing to be

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[11] We make this point clear because in *Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company and Mrs. Edwin Selvin, An Individual*, Cases Nos. 21-CB-850, 21-CC-239, in which the Board heard oral argument simultaneously with the oral argument in the instant case, the same basic 8(b)(1)(A) issue is posed with respect to pickets who are not shown to be strangers.

free from the coercion inherent in all picketing, is not a delicate question but an obvious must.

Lastly, the Respondent Union contends that assuming, *arguendo,* that peaceful picketing coerces employees within the literal meaning of Section 8(b)(1)(A) in their Section 7 guaranteed rights, the legislative history of the Act and Board precedent establish that Congress never intended peaceful picketing, no matter what the objective, to be within the purview of Section 8(b)(1)(A). The short answer to this argument could well be the words of the United States Supreme Court that ". . . where the words are plain, there is no room for construction." [12]

But the Respondent so presses upon us that the legislative history "unequivocably" establishes a contrary Congressional intent that we have, nevertheless, examined it in order to ascertain whether it really conflicts with our interpretation of the meaning of Section 8(b)(1)(A). The principal item of legislative history relied upon by the Respondent Union is found in a report of the "watch dog committee" of Congress dated 1949. It reads as follows:

> Another instance of a strike to force an employer to violate the law is a strike by a minority group of employees for recognition. It seeks to deprive employees of their rights under Section 7 of the Act, . . . If an employer accedes to such demand, he participates in forcing his employees to bargain collectively through an agent to which a majority of them are opposed. *That such a strike is not an unfair labor practice under the present act has been made clear.* In *Matter of Perry Norvell,* 80 NLRB 225, 23 LRRM 1061, Nov. 12, 1948) the Board held that a strike by a minority group for recognition, where another union was recognized agent, did not constitute "restraint or coercion" of the employees in violation of Section 8(b)(1)(A). In other

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[12] *Osaka Shosen Kaisha Line* v. *U.S.,* 300 U. S. 98, 101. See also *Kuehner* v. *Irving Trust Company,* 299 U. S. 445, 449: "The legislative history of this provision . . . cannot affect its interpretation, since the language of the Act as adopted is clear."

words, the Board held that the strike did not restrain or coerce the employees in the exercise of their right to choose their own bargaining representative or to refrain from choosing one, although its objective was to force them to choose an agent to which a majority of them were opposed. (Emphasis supplied.)

The Report goes on to say:

> The Taft-Hartley Law's only limitation upon such strikes is that provided by Section 8(b)(4)(C). *The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.*
>
> A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.
>
> Present law in no way limits the primary strike for recognition except in the face of another union's certification.

This quotation seems, on quick reading, to be highly significant in the evaluation of Section 8(b)(1)(A). But a number of factors serve to minimize if not vitiate entirely its effect. First, the report of the Joint Committee was made several years after the enactment of the Taft-Hartley amendments and as such is not legislative "history" at all, but at most a statement by a subsequent Congressional committee." [13]

Second, the Report does not even purport to state that Congress intended, *when it passed the amendments*, to exempt primary strikes or picketing from the coverage of Section 8(b)(1)(A) in all circumstances. Instead, the Report merely sets forth the Board's decision in *Perry Norvell* and interprets it as a clear holding that a minority strike

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[13] See *U. S. v. The United Mine Workers of America*, 330 U.S. 258. Mr. Chief Justice Vinson, speaking for a majority of the Court, specifically refused to give weight to opinions of Senators expressed after passage of the statute and relied on the meaning of the statute as written and as explained by contemporaneous debate on the floor of the House.

for recognition is not a violation of Section 8(b)(1)(A). Although we believe that this Report overstates the effect of the Board's decisions in *Perry Norvell* and in *NMU*,[14] whether the appraisal is correct or not is not germane to the question of whether it constitutes "legislative history," or even an attempt after the Act was passed to state congressional intent *nunc pro tunc*.

Finally, assuming that the Joint Committee Report may properly be relied upon as "legislative history" and given some weight, the true legislative history contained in the various reports and debates concerning the amendments during their course through initial proposal to final enactment suffices, at the very least, to offset what the Respondent claims the Joint Committee Report stands for. And what in its best posture for the Respondent is at most ambiguous legislative "history" cannot impel disregard for the plain language of Section 8(b)(1)(A).

We shall not here undertake to set forth every item of legislative history that touches on the issue for to do so would unduly burden this decision. A number of items of legislative history quite clearly support the General Counsel's position and are enough to show that the legislative history generally cannot contradict the obvious meaning of the words of Section 8(b)(1)(A).[15]

A most significant interchange occurred between Senators Taft and Pepper in connection with the then proposed Section 8(b)(1)(A) which was not in the original Senate Bill.[16]

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[14] *National Maritime Union of America (The Texas Company)*, 78 NLRB 971.

[15] Some of the legislative history seems to lend support to the Respondent's position (see, for example, the portions quoted by the Board in the *NMU* and *Perry Norvell* cases) but the clearer statements of legislative intent more than outweigh the portions to which the Respondent points. And, as indicated below, even parts of the legislative history cited by the Respondent in support of its contention have been viewed precisely the other way by some authorities. See the *Capital Service* case, *infra*.

[16] Congressional Record, April 25, 1947, pages 41-44.

Senator Taft talks first of a Board case, *Hall Freight Lines*, 65 NLRB 397. There, a union called a strike of dockmen in order to prevail upon truckdrivers to join. As no loading was being done by the dockmen, there was no work for the drivers, who then voted in an informal election 5 to 4 to join the union. The Employer and Union then executed a closed-shop contract, and 7 of the 9 drivers (3 had changed their minds about joining it after the closed-shop contract was executed) were discharged pursuant to the closed-shop contract. The Board dismissed charges against the Employer that it had assisted the Union, and thereby the Board gave effect to the 5-4 vote obtained by the union's curtailing the drivers' work.

Senator Taft went on to say:

> This is a case of coercion of employees who had no connection at all with the union which was doing the coercion.

Senator Pepper responded:

> . . . The Senator did not say that the men were threatened physically. If they were, they had a right to resort to police protection in their own State or City.
>
> Senator Taft: The main threat was "Unless you join our union, we will close down this plant, and you will not have a job." That was the threat, and that is coercion—something which they had no right to do.
>
> The dockmen in that case were not striking for any particular benefit for themselves, but they were striking to coerce the other employees to leave the union of which they were members, and to join the other union—clearly an improper course of action, and clearly a matter which should be restrained by the National Labor Relations Board.
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> • • • • •
>
> Let me point out again that the men who are coerced may not have anything to do with the union at all. They may have nothing to do with the leaders of the union who attempt to coerce them. The leaders who attempt to coerce them may not have anything to do with the plant in which the employees in question work.

> Sometimes the union has not even gotten into the plant when they begin to coerce employees of the plant.
>
> We had a case last year where a union went to a plant in California and said, "We want to organize your employees. Call them in and tell them to join our union." The employers said, "We have not any control over our employees. We cannot tell them, under the National Labor Relations Act." They said, "If you don't we will picket your plant;" and they did picket it, and closed it down for a couple of months.
>
> Coercion is not merely against union members; it may be against all employees.

The import of these remarks by Senator Taft leaves no room for doubt that the leading proponent of the amendments thought that "coerce" in Section 8(b)(1)(A) included picketing to close a plant or lessen its earnings and thereby put employees out of work or diminish their earnings.

The precursor of Section 8(b)(1)(A) was Section 12 of the original House Bill (H.R. 3020). Under that bill, the actions of Respondent Union here would clearly have been unlawful. The Trial Examiner asserts that the omission of the particularized unlawful activities in the Act as ultimately passed indicates a congressional intent not to have declared them unlawful. In the circumstances, however, the import of the deletion of the detailed provisions of Section 12 of H.R. 3020 and the substitution therefor of the present Section 8(b)(1)(A) is exactly the opposite of the Trial Examiner's view. Thus, House Report No. 510 explains Section 8(b)(1)(A) in this language:

> . . . *in its general terms covered all of the activities which were proscribed in Section 12(a)(1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in other paragraphs of Section 12(a).* While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provision of the House bill, participation in them, as ex-

plained in the discussion of Section 7, is not a protected activity under the Act. . . . The conference agreement, while adopting Section 8(b)(1) of the Senate amendment does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not . . . be entitled to reinstatement. (Emphasis supplied.)

In Applying Section 8(1) of the existing law, the Board has not held to be unfair labor practices acts which constituted "interference" that did not also constitute restraint or coercion. Section 8(1) of the present law is written in broad terms, and only by long continued administrative practice has its scope been adequately and properly defined. Concern has heretofore been expressed as to whether such practice would carry over into a corresponding provision of the new Section 8(b)(1), and presumably because of this concern the words "interference with" were omitted from the proposed new section. Omission of these words from the proposed new section was not, however, intended to broaden the scope of Section 8(a)(1) as heretofore defined by the long-continued practice of the Board.

And the Supreme Court in *Auto Workers* v. *Wisconsin Labor Relations Board*, 336 U.S. 245; (1949) quoted with approval the House Committee's "real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."

The Court of Appeals for the Ninth Circuit in the *Capital Service* case [17] amply demonstrates that coercion within the meaning of Section 8(b)(1)(A) exists in even peaceful picketing. The Court said:

"nothing could more strongly restrain *Service's* employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by picketing with appeals to persuade the public to boycott the prod-

[17] *Capital Service, Inc.*, v. *N.L.R.B.*, 204 F. 2d 848 (C.A. 9, 1953).

> ucts of their work. The evidence shows that all of the picketed stores did cease to sell the products manufactured by *Service's* employees. Here is more than an appeal to the *employees to persuade their action.* Here is successful economic coercion tending to prevent them from exercising their right to work by diminishing the public consumption of the product of their work."

Significantly, the Court of Appeals cited a number of excerpts from the legislative history to support its view, including some of the very legislative history that the Respondent cites in support of its position that peaceful picketing never coerces.

We recognize that reasonable men may often differ. The fact that a United States Court of Appeals draws exactly the opposite meaning from these statements than do the Respondent and the Trial Examiner, emphasizes, as we stated above, that the legislative history is certainly not so clear as to overcome the plain language of Section 8(b)(1)(A). This is especially true when the objective of the picketing here, to induce an unfair labor practice by the Employer, is considered. A basic rule of statutory construction is that the policy of the statute be taken into account.[18]

Were we to concede an ambiguity in Section 8(b)(1)(A) and in its legislative history, we would for this reason still be impelled to the same conclusion. Either the Union has violated Section 8(b)(1)(A) here or its attempt to cause Curtis Brothers to commit an unfair labor practice is not within the purview of this statute. Either the Union has violated Section 8(b)(1)(A) here or its attempt to force Curtis Brothers' employees into a bargaining relationship not of their choosing is not within the purview of this statute. Either the Union has violated Section 8(b)(1)(A) here or Section 9(c)(3), as the attorney for the Respondent Union in the companion *Shepherd* case conceded at the oral argument, would be in effect a meaningless and useless sec-

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[18] *Markham* v. *Cabell*, 326 U.S. 404; *Nardone* v. *United States*, 308 U.S. 338; *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218.

tion.[19] Yet all of these concepts are part of the general policy of the National Labor Relations Act as amended. For that reason, if for no other, we would resolve any seeming ambiguity in Section 8(b)(1)(A) so as to comport to the general policy of the statute as a whole.

The Respondent's final argument, and one that the Trial Examiner also utilizes in finding no violation, is that earlier Board decisions are against the General Counsel's position. None of the cases cited to us by the Respondent or adverted to by the Trial Examiner is directly in point. In many of them, a violation of some section of the Act other than 8(b)(1)(A) was found—the Board holding only that the conduct called illegal did not *also* violate Section 8(b)(1)(A). As we have shown, the problem in the instant case is not "which section?" is involved but "has the Act been violated at all?" Thus the policy of the Statute which impels a finding of a violation here is not called into play in those cases where a violation was found in any event. In other decisions, more specifically the *NMU* and *Perry Norvell* cases, not only were violations of the Act found as to the Respondent Unions involved, but the particular union conduct to which this Respondent now points did not involve picketing for exclusive recognition by a union that clearly did not represent a majority of the employees. Furthermore, the Board said, in dismissing the particular 8(b)(1)(A) allegation in *NMU*:

> "The touchstone of a strike which is violative of Section 8(b)(1)(A) is normally the *means* by which it is accomplished, *so long as its objective is directly related to the interests of the strikers and not directed pri-*

[19] Section 9(c)(3) provides, in pertinent part: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." Were this Board to permit conduct that foists a collective bargaining representative upon unwilling employees immediately after a losing election, this provision of the Statute would have meaning only to the extent a union was willing to forego the use of coercion to achieve what the Statute expressly precludes the Board from according to it.

> *marily at compelling other employees to forego the rights which Section 7 protects* (Emphasis supplied)."

No such legitimate objective was present here; the picketing for recognition was not "directly related to the interests of the strikers." Instead, in direct contrast to the situation in *NMU*, it was "directed primarily at compelling . . . employees to forego the rights which Section 7 protects."

On the other hand, to the extent that the cases cited seem contrary to the results reached here, we would be remiss in our duty were we to consider what is at best dubious precedent as overcoming the clear policy of the statute as a whole.

As set forth above, there is substantial precedent for finding the violation here, for the courts have held that peaceful picketing can be coercive,[20] that peaceful picketing is not *per se* "free speech,"[21] and that the National Labor Relations Act does not "protect" concerted activities (i.e., picketing for an unlawful objective.[22] In the *Garner* case,[23] the Supreme Court had before it a factual situation almost identical to the one in the instant case. Although the issue before the Supreme Court was "preemption" the following significant language was used:

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore is governable by the state or it is entirely ungoverned."
>
> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to portions of the Pennsylvania statute, it has forbidden labor unions to assert certain types of coercion on employees through the medium of the employer."

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[20] For example, *Capital Service, supra.*

[21] See footnote 5, *supra.*

[22] *Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31; *N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332.

[23] *Joseph Garner, et al.* v. *Teamsters, et al.*, 346 U.S. 485.

The Supreme Court obviously thought that the Board had power to prevent the precise kind of activity we are here asked to prevent.

For all the foregoing reasons, we find that the Respondent Union, by picketing for recognition as the exclusive bargaining representative when it did not represent a majority of Curtis Brothers' employees, restrained and coerced Curtis Brothers' employees in the exercise of the rights guaranteed them by Section 7 of the Act, thereby violating Section 8(b)(1)(A).

The Remedy

Having found that the Respondent has violated Section 8(b(1)(A) of the Act, we shall order the Respondent to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from restraining or coercing employees of Curtis Brothers, Inc. in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent Union's business offices, meeting halls, and all places where notices to its members are customarily posted, copies of the notice

attached hereto marked "Appendix."[24] Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by official representatives of the Respondent Union, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty(60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice attached hereto marked "Appendix" to the Regional Director for the Fifth Region for posting, Curtis Brothers, Inc., willing, at all locations where notices to the Company's employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by authorized representatives of the Respondent, be forthwith returned to the Regional Director for such posting.

(c) Notify the Regional Director for the Fifth Region in writing, within ten (10) days from the date of this Order, as to the steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., October 30, 1957.

Boyd Leedom, *Chairman*

Philip Ray Rodgers, *Member*

Stephen S. Bean, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[24] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

JOSEPH ALTON JENKINS, MEMBER, concurring:

The only issue presented by this case is whether Section 8(b)(1)(A) of the Act prohibits a union from picketing to coerce an employer into compelling his employees to join the union after this Board has certified that the union failed to receive a majority of votes in a Board-conducted election. Like my colleagues, I believe that Section 8(b)(1)(A) does proscribe such picketing.

The Respondent here, although representing, at most, only a very small minority of the employees, nevertheless picketed the premises of the Employer with the immediate object of compelling the Employer to recognize it as exclusive bargaining representative of all of the Employer's employees.[25] Clearly, had the Employer capitulated; had it recognized and dealt with the Respondent under these circumstances, it would have violated Sections 8(a)(2) and (1) of the Act. Picketing designed to accomplish a result specifically made unlawful by the Act must, itself, be unlawful. When it it conducted in the context presented by this case it is unlawful in that it is violation of Section 8(b)(1)(A). In my opinion, the mandate of the Act, as expressed in its policies, can lead to no other conclusion. Section 8(b)(1)(A) specifically prohibits a labor organization from coercing empolyees in the exercise of rights guaranteed by Section 7. When the Respondent, by picketing, sought to coerce the employees in the exercise of rights guaranteed by Section 7. which had but recently been rejected by these employees, Section 8(b)(1)(A) was thereby violated.

There is nothing novel in the foregoing conclusion. Tribunals other than this Board, when called upon to interpret State statutes or State policies similar to that of the National Labor Relations Act have reached similar con-

[25] Like my colleagues, I find that the picketing of the Respondent herein, subsequent to the Board-conducted election, was for the object of recognition.

clusions. Thus, in *Pappas* against *Stacey*,[26] the issue was whether the Maine Court had the power to enjoin picketing by a union which represented only 3 out of 30 employees in the unit and where the purpose of the picketing was conceded to be "to organize other employees [and] ultimately to have the plaintiff enter into collective bargaining and negotiation with the Union."[27] The Maine Supreme Judicial Court construed the Maine statute as giving employees the right to organize" . . . free from interference, restraint or coercion by their employers or other persons,"[28] and held:

> *A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.*
>
> In reaching for the employees, there is a steady exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during non-compliance . . . with the requests of the Union. • • •
>
> The employee cannot escape a share of the irreparable damage admittedly caused to the business on which his livelihood depends. Irreparable damage to employer must in any appreciable period be like damage to the employee. The defendants say in substance to the twenty-seven non-union workers—'join with us or we will continue to harm the business in which you are employed.'

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[26] 151 Me. 36, 116 A. 2d, 497; 36 LRRM 2619, appeal dismissed by the U.S. Supreme Court, 76 Sup. Ct. 117; 350 U.S. 870; 36 LRRM 2756.

[27] The citing of this case insofar as it mentions the organizational objective of the picketing is not to be construed as an expression of my viewpoint with regard to organizational picketing, as such (if there is any such thing as purely organizational picketing),—that issue is not before the Board at this time.

[28] Note the similarity of this wording to Section 7 of the N.L.R.A.

> The picketing is at least an act of interference with the employee in the exercise of his personal rights. It violates the language and the purpose of the statute, *supra*, and it is unlawful.
>
> (Emphasis supplied.) [29]

Moreover, during the past few years, the Supreme Court of the United States has had occasion to stamp its approval upon similar policy decisions on appeals from State courts in both the *Gazzam* and the *Vogt* cases,[30] cited in the majority opinion. The Supreme Court held in such cases that under State statutes similar in content and in declared policy to the National Labor Relations Act, picketing by a minority union for the purpose of compelling an employer to enter into an agreement with the union was proscribed as a violation of State policy because it was an attempt to coerce employees in the exercise of their rights. In the *Gazzam* case, the Supreme Court held:

> . . . here, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state that guaranteed workers free choice of representatives for bargaining purposes. If the respondent had complied with Petitioner's demands and had signed one of the tendered contracts and lived up to its terms, he would thereby have coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative.

In the *Vogt* case, which was, indeed, very similar to the case at bar—and arose under a Wisconsin statute which made it an unfair labor practice to ". . . coerce, intimidate,

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[29] For similar decisions under similar State laws, see *Goodwin's, Inc.* v. *Hagedorn*, 303 N.Y. 300; *Dairy Workers Union* v. *Milk Drivers (N.J.)*; 39 LRRM 2208; *Audubon Homes* v. *Spokane Building Council (Wash.)* 298, p. 2, D 1112; *Blue Board Cafeteria* v. *Hotel and Restaurant Employees*, 254 S. W. 2d 335 (Ky.); and *Vogt* v. *Teamsters Local 695*, 270 Wis. 315.

[30] *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Teamsters Local 695* v. *Vogt, Inc.*, 354 U.S. 284, decided June 17, 1957.

or induce any employer to interfere with any of his employees in the enjoyment of their legal rights"—the Supreme Court held that the Wisconsin Court had the right to enjoin the Union's minority recognition picketing. It seems to me most significant that the Supreme Court, in making its finding affirming the Wisconsin court, made the following reference:

> The Stacey case is this case. . . . As in Stacey, the highest state court drew the inference from the facts that the picketing was to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State. *(For a declaration of similar congressional policy, see Section 8 of the Taft-Hartley Act, 61 Stat. 140, 29 U.S.C. Section 158.)* (Emphasis supplied.)

Although dictum, I believe that the Court had in mind that the Act proscribes picketing such as the Respondent here has utilized, inasmuch as the *Vogt* case deals with the same type of picketing activity for a like object as the picketing which is the subject of this case. This view is strengthened when *Vogt* is read in the light of the *Garner* case.[31]

Garner was a truckman and had 24 employees, 4 of whom were members of the picketing Teamsters Union. No controversy, labor dispute or strike was in progress at the None of the pickets were employees. The picketing was None of the pickets were employees. Th picketing was orderly and peaceful.

The Supreme Court held (at p. 487):

> The courts below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the Union.
>
> The equity court held that respondents' conduct

[31] *Joseph Garner, et al. v. Teamsters, et al.*, 346 U.S. 485.

violated the Pennsylvania Labor Relations Act.[3] The Supreme Court of the Commonwealth held, quite correctly, we think, that petitioners' grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices. It therefore inferred that state remedies were precluded. • • •

[3] The Pennsylvania statute does not specifically prohibit the type of union conduct charged in the complaint. However, the court reasoned that the union was attempting to force petitioners to violate Section 6 (c) of the statute, which provides that 'It shall be an unfair labor practice for an employer. . . . (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization. . . .' Pa. Laws 1937, 1172, Purdons Pa. Stat. Ann. 1952, Tit. 43, Section 211.6.

(at p. 488-489):

The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will, the area in which state action is still permissible.

This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' • • •

Congress has taken in hand this particular type of controversy where it affects interstate commerce. IN LANGUAGE ALMOST IDENTICAL TO PARTS OF THE PENNSYLVANIA STATUTE, IT HAS FORBIDDEN LABOR UNIONS TO EXERT CERTAIN TYPES OF COERCION ON EMPLOYEES THROUGH THE MEDIUM OF THE EMPLOYER.[5] (Emphasis supplied.)

[5] In this footnote, p. 489, the Court set forth the provisions of Sections 8 (b) (2) and 8 (a) (3).]

While the Court also indicated that it would not surmise how the Board would have decided the *Garner* controversy if presented to it in the first instance, I deem it significant that the Supreme Court squarely held that the Board has

been given express statutory authority to deal with a case involving a controversy almost identical in its basic elements to that now before us. Since *Garner*, the Supreme Court has twice held that with respect to industries affecting commerce the Board alone has authority to deal with minority picketing to compel recognition by an employer of a union as the exclusive bargaining agent for its employees and for a union-shop contract, the means whereby the employer would effectively compel unwilling employees to join the very union they had refused to accept as their representative or had expressly repudiated. *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 22-23, vacating and remanding 164 Ohio St. 285, 130 N.E. 2d 237; *San Diego Building Trades Council, et al.* v. *Garmon, et al.*, 353 U.S. 26, 27-28, vacating 45 Cal. 2d 657, 291 P. 2d 1. This disposes of any contention that Congress did not deal with the subject matter of the case now at hand. The Supreme Court has said that it did.

Following *Garner*, the Court of Appeals for the Second Circuit considered the question of stranger picketing for a contract. In reversing a District Court's injunction in *Aetna Freight Lines* v. *Clayton*, 228 F. 2d 384, 389, the Court, citing *Garner*, stated:

> Here is simply a case of peaceful picketing against which Congress in the Act has provided the *complete remedy.* (Emphasis supplied.)

The Supreme Court denied certiorari. 351 U.S. 950. I am also impressed that the Supreme Court of the Commonwealth of Pennsylvania put the same construction on almost identical language as I placed on Section 8(b)(1)(A).

In addition, the legislative history of the Act itself makes it clear that Section 8(b)(1)(A) was designed to proscribe minority picketing for recognition such as the Union in this case conducted. Time after time in the congressional debates which preceded the passage of the Act the late Sen-

ator Taft stated that a purpose of Section 8(b)(1)(A) was to protect employees from being forced to become members of minority unions, or of stranger unions, against their will. In this connection one such statement warrants repetition:

> Let me point out again that the men who are coerced may not have anything to do with the union at all. They may have nothing to do with the leaders of the union who attempt to coerce them. The leaders who attempt to coerce them may not have anything to do with the plant in which the employees in question work. Sometimes the union has not even gotten into the plant when they begin to coerce employees at the plant.
>
> We had a case last year where a union went to a plant in California and said, 'We want to organize your employees. Call the men and tell them to join our union.' The employers said, 'We have not any control over our employees. We cannot tell them, under the National Labor Relations Act.' They said, 'If you don't, we will picket your plant.' And they did picket it, and closed it down for a couple of months.
>
> Coercion is not merely against union members; it may be against all employees. * * *
>
> There is no law of any State providing that a man cannot threaten another man that if he does not join a union he may lose his job, or that something may happen to him other than actual physical violence. *There are plenty of methods of coercion short of actual physical violence.*[32] (Emphasis supplied.)

What stronger declaration can be found that coercion of the type emanating from minority recognition picketing was meant to be proscribed by Section 8(b)(1)(A)? What stronger contention can be presented in favor of the broad interpretation, which I espouse, than this quotation which clearly implies that *means or methods* such as violence be left to the States for policing while *unlawful objectives* are for this Board to remedy? In this I am supported by the

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[32] 93 Cong. Rec. 4144-4145; 2 Leg. Hist. 1030-1031.

Supreme Court. In *International Union* v. *Wisconsin Board*, 336 U.S. 245, the Court stated (at 253):

> While the Federal Board is empowered to forbid a strike, when and because its *purpose is one that the Federal Act made illegal*, it has been given no power to forbid one *because its method is illegal*—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. (Emphasis supplied.)

A more restrictive interpretation defeats the policies of the Act.[33]

The picketing which constitutes the gravamen of the complaint in this case occurred immediately after a Board-conducted election in which the employees involved almost unanimously rejected the picketing union. The policy of the Act that employees be assured freedom of choice of bargaining representatives would be completely destroyed and the Board's election machinery rendered ineffectual if, following such a Board-conducted election, a union which has been completely and thoroughly rejected by the employees involved could then force itself upon those employees by picketing their employer for recognition purposes, and thus gain what it did not lawfully gain by means of the previously held, statutory, Board-conducted election. I believe that the Board would be remiss in the duties imposed by the Act if it permitted a minority union to accomplish by coercion what it has previously been unable to accomplish by a valid election.

It is the policy of the Act to prevent interference with the right of employees to freely choose or refrain from choosing a bargaining representative. The Congress invested the Board with authority to enforce this policy by the

[33] I do not here discuss the line of cases, amply treated in the majority opinion, which hold that picketing is not necessarily free speech and that whether it is protected under the 14th Amendment of the Constitution depends upon the context in which the picketing occurs. The principle of those cases is too well established to warrant discussion. See the *Vogt* case, cited fn. 30, *supra*.

application of Section 8(h)(1)(A) with regard to labor organization unfair labor practices in the same sense that the Board was given authority to enforce it to remedy employer unfair labor practices in Section 8(a)(1). As heretofore stated, this was the Congress' declared intent. It follows that Section 8(b)(1)(A) deals with all forms of coercion, economic or otherwise, for the proscribed objectives. When the object of picketing by a minority union is to force employees to join a union which is not of the majority's choosing, the Board must apply Section 8(b)(1)(A) in its broad sense to enjoin and remedy such picketing.

I do not believe that Congress intended to or did write a statute providing for elections conducted at public expense which are to be considered binding if the union wins but not binding if the union loses. Further, I believe Section 8(b)(1)(A) to be directed toward the accomplishment of a fundamental objective of the Act, i.e., to protect employees in the exercise of the rights guaranteed by Section 7 of the Act. While the States may more immediately and effectively protect employees from physical coercion through the exercise of their police power (and Section 8(b)(1)(A) may incidentally also provide another remedy), a primary purpose of such section is to deal with the more subtle forms of coercion and restraint engaged in for an unlawful purpose. When a union has lost an election conducted by the Board, it coerces and restrains employees when it pickets thereafter to compel the employer either to lose business or force his employees to join the union, and it coerces and restrains the employees when it is attempting to cause or causes their employer to lose business because it places the employees' security in their jobs and wages in danger. It seems clear to me that Congress was dealing much more with objectives than means. Though there are Board cases to the contrary, those cases seem to me to be an exercise in mystical semantics. While mystical semantics may have their place in an intellectual exercise, they have

no place in the interpretation of a statute designed to effectuate an economic policy. The statute, if it is to accomplish its avowed purpose, must be construed in the light of the economic realities of commercial life. Many who would resist physical coercion with a stout heart quail before the fear of economic reprisal.

The genius of the Wagner Act lay in the fact that its provisions were broad and were interpreted broadly so as to prevent the avoidance of its impact by intellectual subleties or by-play. Similarly, we should so construe the amendments to that Act (*i.e.*, Taft Hartley) so as to accomplish their purpose. These are not amendments dealing with the rights of private parties, but dealing with a basic policy of the Government of the United States, and, as such, should be so construed. The purpose of Section 8(b)(1)(A) is to free employees from coercion and restraint, but the forms of such coercion and restraint are not specified. The words "restrain and coerce" appear both in 8(a)(1) and 8(b)(1)(A). As Senator Taft stated, the Board has interpreted 8(a)(1) for years and

> All that is attempted is to apply the same provisions with exact equality to labor unions.[34]

It necessarily follows that Congress intended to leave it to the Board to prohibit such coercion and restraint in whatever form or context it may appear in the same manner that the Board for many years has prevented restraint and coercion on the part of the employers under Section 8(a)(1) of the Act.

I note the statement of our dissenting colleagues that the Supreme Court in *UMV.* v. *Arkansas Oak Flooring*, 351 U. S. 62, "relied upon" the report of the "watchdog committee" discussed in his dissent and in the majority decision. In particular, the Court quoted at footnote 14 the following from the report:

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[34] 93 Cong. Rec. 4562, 2 Leg. Hist. 1207, cited with approval in *Capital Service, Inc.* v. *N.L.R.B.*, 204 F. 2d. 848, 852 (C. A. 9).

> Present law in no way limits the primary strike for recognition except in the face of another union's certification.

However it is to be noted that the Court was considering only an undisputed *majority strike*. The issue in that case was whether a state court could enjoin a majority strike for recognition by a union which had not filed the information and affidavits described in Sections 9(f), (g) and (h). Apparently dispositive of the question as to whether the oft-quoted Committee Report is conclusive is other language of the Court. On page 68 of the decision, the Court, in footnote 2 discussed the question as to whether the striking union represented a majority of the employees. The court stated:

> Respondent also had sought the injunction on the alternative ground that the request for recognition by the union was being made in the absence of a selection of the union by the majority of the respondent's employees. The Supreme Court of Louisiana did not pass on this contention. The record upon which the temporary and permanent injunctions were granted contained concededly genuine applications for union membership and authorizations for union membership and authorizations of representation from 179 of the 225 eligible employees. *Accordingly we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees* or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees.[35]

The Court in *Arkansas* clearly differentiated between majority picketing for recognition which it held to be legal and picketing for such recognition by a stranger or minority union, a question which it did not have to consider in that case because of the undisputed majority status of the picketing union. However, in *Garner*,[36] the Court did consider the

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[35] (Emphasis supplied.)

[36] *Supra.*

question of picketing by a stranger or minority union and found it to be forbidden by the Act.

Nor do I or the majority hold as the dissent seems to imply that all picketing is banned. The Supreme Court in *Arkansas* specifically found to the contrary and held that picketing by a majority union for recognition albeit a non-complying union, is legal and protected by the Act. In view of the implications of the dissent, I again repeat that all I hold herein is that stranger or minority picketing for recognition under the circumstances herein, is condemned by the Act.

Dated, Washington, D. C., October 30, 1957.

Joseph Alton Jenkins *Member*
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK, MEMBER, dissenting:

My colleagues here overturn long standing Board precedents to adopt an interpretation of the Statute of far-reaching consequence, seriously detrimental to the rights of employees to engage in concerted activities. I must dissent. I would adopt the Intermediate Report which painstakingly reviews the legislative history and the applicable precedents which it correctly applies.

The members of the majority and the concurring member here find that peaceful picketing—in fact, picketing by no more than two pickets at non-employee entrances of an employer's business who did not even talk to employees—"coerces" employees within the meaning of Section 8(b)(1)(A) of the Act because the union did not have a majority and its purpose was recognition. In order to so find, they adopt a theory of coercion so extreme as to render all picketing unlawful under Section 8(b)(1)(A) and all pickets unprotected by Section 8(a)(3). Their theory of

coercion is this: employees may sustain economic loss if their employer's business suffers as a result of picketing; therefore, employees are pressured by picketing. When, in addition, the object of the picketing affects employee rights under Section 7 of the Act, then the requirements for finding coercion under Section 8(b)(1)(A) are fulfilled—the picketing pressures employees in the exercise of their rights guaranteed by Section 7. Obviously such a theory is applicable to *all* picketing. Inherent in any picketing is the possibility of economic loss due to curtailment of the employer's business. Inherent in any picketing is an effect upon Section 7 rights since picketing necessarily affects the right of employees to refrain from supporting the concerted activity of picketing and any purpose to which it may be directed.

The majority seeks to narrow the obvious applicability of their coercion theory to all other picketing by emphasizing their holding that the *purpose* of the picketing in this case was improper in that it sought recognition for a labor organization which represented only a minority of the employees. But the object of picketing does not influence its nature or its effect upon employees. Whatever pressure is exerted on employees by reason of the possibility of financial loss due to picketing is the same regardless of the object of the picketing. And the effect of the picketing on the exercise of Section 7 rights by employees is present regardless of the object, for the pressure exerted tends to cause employees to support the picketing and therefore interferes with their right to refrain from taking a stand with respect to such concerted activity. I am not unmindful of my colleagues' attempts to distinguish the picketing here on the ground it was by a union which had been soundly rejected by employees in a Board election—and their argument that in the contrary situation where a majority union is in the picture employees have no right not to be represented by that union. But even where there is a majority representative in existence employees have a right not to

assist that union in obtaining recognition, a right not to be represented by it on grievances, a right not to join or support it except to the extent required by the proviso to Section 8(a)(3), and a right to rifrain from actively participating in its activities and efforts. Even picketing by a majority union would impinge upon these rights.

I submit, therefore, that the theory of coercion here adopted is so broad as to proscribe all picketing. Under such a theory any picketing, no matter how orderly and peacefully conducted, constitutes coercion in violation of the Act. It would logically follow then that picketing is not a protected concerted activity and employees who participate in picketing are not protected by Section 8(a)(3). Any strike accompanied by picketing becomes coercive and the strikers vulnerable to discharge or other penalty without remedy of reinstatement or back-pay under the Act. Hence the theory of coercion crucial to this decision necessarily extinguishes the right of employees to picket, a traditional form of self-organization generally protected by Section 7 of the Act and a concomitant of the right to strike specifically protected by Section 13.[37] Thus the decision substantially narrows the area of concerted activity open to employees and immeasurably weakens the effectiveness of the right to strike by placing beyond the pale the most common form of publicizing strikes. Such a decision is completely untenable under the Statute and under precedent.[38]

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[37] In connection with the assertion of the majority that Section 13 has no relation to so-called stranger pickets, I would point out that employees of any employer have the right to picket under Section 7 and have a personal stake in organizing other employees, enlisting support, and in protecting their own wages and working conditions from the competition of non-organized operations. See Section 2(3) of the Act; *Briggs Mfg. Co.* 75 NLRB 569.

[38] Compare the similarly extreme view of what type picketing constitutes inducement within the meaning of Section 8(b)(4)(A) recently adopted by a majority of this Board in the case of *Dallas General Drivers*, 118 NLRB No. 165, to which I dissented.

Sections 8(b)(1)(A), declaring it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of rights guaranteed in Section 7, *does not ban peaceful picketing as coercion whatever the object of the picketing.* This section of the Act was designed to make labor organizations responsible for their coercive conduct against employees similarly as Section 8(a)(1) made employers responsible for coercion against employees. The Senators who sponsored this section of the Statute, which was added by amendment on the floor of the Senate, explained that in committee they had heard "many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizational campaigns" and "direct interference by mass picketing and other violence" and believed that "the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer." [39] Senator Ball, who proposed the amendment adding the provision, stated that its purpose was "simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the union also shall be guilty of unfair labor practices." [40] On another occasion he explained that "the only purpose is to protect the rights of employees, to free them from the coercion of goon squads and other strong-arm organizing techniques. . ." [41]

In describing the type of conduct which they considered the section would cover, the sponsors listed threats that if an employee did not join a union, the union would raise the initiation fee or get a closed shop and keep the employee from working at all; threats to beat an employee or his family if he did not join the union and sign a card; and "the

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[39] Sen. Rep. No. 105, 80th Cong. 1st Sess. 50 (1947).

[40] 93 Cong. Rec. 4016 (1947).

[41] 93 Cong. Rec. A 2252 (1947).

actually violent act of forcibly, by *mass* picketing, preventing a man from working." These acts by unions were compared to acts by employers which had been found coercive under Section 8(a)(1) such as threats to fire an employee, to reduce wages, or visit some type of punishment upon an employee if he joined a union.[42]

The sponsors of Section 8(b)(1)(A) specifically denied that the section outlaws peaceful persuasion. Thus Senator Taft explained the effect of the section to be this:

> The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say "Here are the rules of the game. You must cease and desist from *coercing* and restraining the *employees who want to work from going to work* and earning the money which they are entitled to earn." The Board may say, "*You can persuade them; you can put up signs;* you can conduct any form of propaganda you want to in order to persuade them, *but you cannot,*

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[42] 93 Cong. Rec. 4435 (1947). The exchange between Senators Taft and Pepper which the majority opinion refers to, I would point out, was concerned not with the precise coverage of Section 8(b)(1)(A), but with whether there was a need for any such provision. Senator Pepper suggested that the section was unnecessary because employees were adequately protected from union abuses by the constitution and by-laws and election processes of their organizations and by existing criminal statutes. Senator Taft rejected this idea and in reply urged that all employees were not union members to whom union election procedures were available to correct the abuses of union leaders. In the same exchange, not quoted by the majority, Senator Taft referred to the following situation as "coercing" employees: ". . . even if there is a fair election in a union, the man who is elected may have been voted against by various of the employees who did not desire to have that particular man elected as the union leader. In such cases the very fact that they did vote against that man is often used later by the union as a means of coercing such employees, and in some cases the union expels them from the union or subjects them to treatment which interferes with their rights as American citizens." (93 Cong. Rec. 4023 (1947)). Yet Senator Taft and other sponsors of Section 8(b)(1)(A) offered no objection to the proviso to that section which declares that it does not prevent a labor organization from prescribing its own membership rules; and Senator Ball who offered the 8(b)(1)(A) amendment stated in connection with the proviso that "it was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions." (93 Cong. Rec. 4272 (1947)).

by threat of force or threat of economic reprisal, prevent them from exercising their right to work."[43] (Emphasis supplied.)

Senator Taft further insisted that it would not prevent anyone from "conducting peaceful picketing." Thus he said:

> . . . The cease-and-desist order will be directed against the use of threats and coercion. *It will not be directed* against the use of propaganda or the use of persuasion, or *against the use of any of the other peaceful methods of organizing employees.*
>
> Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees.
>
> It would not outlaw anybody striking who wanted to strike. *It would not prevent anyone* using the strike in a legitimate way, *conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work* if they wished to go to work.
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> • • •
>
> The Senator suggests that after a hearing the Board may find that threats and coercion have been used, and may issue a cease-and-desist order against the further use of threats and coercion. Then in what way does that prevent the union from going right ahead with its strike and with its organizational activities?[44] (Emphasis supplied.)

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[43] 93 Cong. Rec. 4436 (1947).

[44] 93 Cong. Rec. 4436 & 4437. A detailed account of the history of Section 8(b)(1)(A) and the debates concerning it is set forth in the case of *National Maritime Union of America*, 78 NLRB 971, 982, where the Board first considered the issue here presented concerning the interpretation of Section 8(b)(1)(A). In dismissing consideration of the legislative history of Section 8(b)(1)(A) in this case with the "short answer" that there is no room for construction of the language of the provision, my colleagues overlook Supreme Court cases emphasizing that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination' ". *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479. See also *U.S.* v. *Dickerson*, 310 U.S. 554; *U.S.* v. *American Trucking Association, Inc.*, 310 U.S. 534; *Ozawa* v. *U.S.*, 260 U.S. 178.

Moreover, the sponsors of Section 8(b)(1)(A) agreed to eliminate from its language the words "interfere with" which were originally included in the section in addition to the words "restrain" and "coerce", in order to make clear that the provision did not cover persuasion and peaceful organizational activity.[45]

It is thus clear that Section 8(b)(1)(A) properly read in the light of its legislative history and the Act as a whole covers conduct such as the exertion of physical force against employees, threats of force or economic coercion, and violent picketing which would prevent ingress to work. It does not cover peaceful picketing and does not concern itself with the object of picketing. Section 8(b)(4) of the Act is the section which treats with the object of picketing and which bars strikes and picketing directed toward certain specified ends. Even Section 8(b)(4) limits the ban on such conduct to a very few prohibited objects. The report of the Joint Committee on Labor-Management Relations, quoted in the majority opinion, states: "a strike by a minority group of employees for recognition is not an unfair labor practice under the present act," and the "right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative." The majority opinion is in error in characterizing this "watchdog committee" report as the "principal item of legislative history" supporting this interpretation of the Act, following which it is brushed off as not legislative history at all because made two years after Taft-Hartley was enacted. It is the statements of Senator Taft quoted above which are the principal items of legislative history delineating the intended scope of Section 8(b)(1)(A). The "watchdog committee" report is significant, and properly so, as a reaffirmation by sponsors of the legislation, including Senator Taft who was a member of the committee, of the limited scope of Section 8(b)(1)(A) as set forth in Senator

[45] 93 Cong. Rec. 4271 (1947).

Taft's statements prior to its enactment. I further note that a majority of the Board, including two members of the majority herein, recently considered the report of the "watchdog committee" an adequate basis to support a finding as to Congressional policy in *Ekco Products Company*, 117 NLRB No. 31, at page 9. I note too, that the Supreme Court relied on the same report in *UMW* v. *Arkansas Oak Flooring*, 351 U. S. 62. The concurring member of the majority answers my reference to this case by devoting considerable space to distinguishing it on the merits from the instant case. In so doing he misconceives my purpose in referring to it. I do not refer to *Arkansas Oak Flooring* as governing the merits of the instant case. I have cited it only for the very limited purpose of showing that the Supreme Court has relied upon the "watch dog" committee report as good evidence of Congressional intent, albeit in a case involving a different problem, in answer to the majority's rejection of the committee's report as entitled to no weight because it is characterized as post-legislative history.

The Board has had occasion previously to interpret Section 8(b)(1)(A) in similar situations and has consistently rejected any such theory of coercion as that now adopted by the majority. I refer particularly to the cases of the *National Maritime Union*, 78 NLRB 971; the *Perry Norvell Company*, 80 NLRB 225; and the *Painters District Council No. 6*, 97 NLRB 654. In these cases the Board found that Section 8(b)(1)(A) covers violence and intimidation by unions and threats of economic action against specific individuals and is directed at the *means* by which strikes and picketing are conducted, not at the *object* of such activities. The Board points out in these decisions that the impact of a strike on employees who disapprove it is the same regardless of the purpose of the strike. Speaking as a member of the Board which decided these early cases on the interpretation of 8(b)(1)(A), I suggest that reading the decisions will demonstrate the very careful and painstaking study and research that went into them. They constitute a com-

plete answer to the statement in the concurring opinion that these precedents are mere "exercises in mystical semantics."

The main majority opinion seeks to belittle the significance of these precedents by urging that they did not involve picketing for recognition by a union that "clearly" did not represent a majority of employees.[46] Basically, the issue in those cases and in the instant one is the same: whether a strike or picketing peacefully conducted is coercive within the meaning of Section 8(b)(1)(A) regardless of its object. In the *NMU* case the object of the strike was an unlawful preferential hiring provision in a contract; in *Perry Norvell* the strike was allegedly in violation of a contract and for the purpose of abrogating the contract during its term in violation of Section 8(a)(5) and Section 8(d) of the Act; in *Painters District Council* the aim of the strike was to cause employees to repudiate a decertification petition. In each situation the threat of economic loss to employees by reason of the strike was as great as that in the instant case; in each situation the aim of the strike similarly affected the exercise of Section 7 rights by employees; in each case the Board considered arguments such as those offered by the General Counsel in this, yet found that the strikes, peacefully conducted, were not coercive despite their objectives. The cases are clear precedent for finding that the picketing here was not violative of Section 8(b)(1)(A).

The majority in effect overrules these cases which deal directly with Section 8(b)(1)(A) and relies as precedent on Supreme Court cases holding that the Constitutional protection of free speech does not prevent States from regulating picketing for certain objectives contrary to state policy and cases holding that concerted activities, such as

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[46] The Trial Examiner in this case points out, however, that the briefs in the *Perry Norvell* case and the Board's Fourteenth Annual Report, page 83, make clear that the strike in that case was by a minority group.

picketing, for certain unlawful objectives are not protected activities under the Act. Clearly such cases are inapposite. Nor is the *Garner* case, described in the majority opinion as "a factual situation almost identical to the one in the instant case" and in the concurring opinion as "a case involving a controversy almost identical in its basic elements to that now before us," controlling. The Court in finding that the conduct there involved—picketing to coerce an employer to compel his employees to join the union—was covered by the Act, was clearly not considering Section 8(b)(1)(A) but was specifically referring to Section 8(b)(2) which makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate in regard to hire or tenure of employment.[47] Moreover, the *Garner* decision, in effect, repudiates any theory such as the majority's coercion theory which would ban all picketing. In *Garner* the Court expressly states:

> For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing.[48]

The *Capital Service* case cited by the majority of course lends support to its interpretation of Section 8(b)(1)(A). However, this Board has never recognized the correctness of the decision. Indeed, when the decision was rendered, this Board petitioned for rehearing, urging in its petition "that the Court's holding is erroneous and has important consequences in the administration of the Act." The Board's petition relied upon the legislative history and upon the

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[47] In *International Union* v. *Wisconsin Board*, 336 U. S. 245, quoted by the concurring member to the effect that the Act remedies only unlawful objectives of strikes rather than means or methods of striking, the Court was obviously speaking only of Section 8(b)(4) which is the section of the Act dealing specifically with what type strikes are prohibited and defining such strikes in terms of their objectives.

[48] 346 U. S. 485, 499, and 500.

Perry Norvell and *National Maritime* decisions which I have referred to earlier to support the interpretation of Section 8(b)(1)(A) taken therein and its position that the activity in the Capital Service case was the kind of peaceful economic action which the proponents of Section 8(b)(1)(A) indicated would not be banned thereby.

Board and Court cases interpreting the meaning of coercion under Section 8(a)(1) of the Act likewise fail to support the majority's theory of coercion. The words "restraint" and "coerce" are used in that section as applied to conduct by employers. Although the sponsors of Section 8(b)(1)(A) generally referred to Section 8(a)(1) as comparable to 8(b)(1)(A), and the concurring Board Member asserts that the Board should prohibit coercing under 8(b)(1)(A) in the same manner it prevents coercion under 8(a)(1), as noted previously, the sponsors of that section eliminated the words "interfere with" which are found in Section 8(a)(1), in order to make clear that section did not proscribe peaceful methods. Furthermore, no such extreme theory of coercion as that advanced in the majority decision has been applied to the acts of employers. Inherent in the employment relationship is the possibility of economic loss if an employee displeases his employer and the possibility of gain if an employee finds favor with the employer. Yet an employer may urge upon employees his preference as to union representation,[49] may disparage unions and their leaders,[50] and may predict unfavorable economic consequences will result from self-organization,[51] without being found to coerce his employees in violation of Section 8(a)(1). In each of these situations the possibility of economic loss is evident to employees if they do not support the employer's position, and in each situation the employer's conduct effects the exercise by employees of their rights under Section 7.

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[49] See, e.g., *Sterling Cabinet Corp.*, 109 NLRB 6.

[50] See, e.g., *Blue Bell, Inc.*, 107 NLRB 514, 526.

[51] See, *e.g.*, *Cary Lumber Company*, 102 NLRB 406, 409.

The majority chooses to ignore the interpretation of Section 8(b)(1)(A) developed by this Board in the applicable precedents like the *NMU* and *Perry Norvell* cases and devises its new theory as to the meaning of coercion. Apparently aware of the extremity of the position, however, the majority attempts to underestimate the significance of the decision by insisting that it is restricted to the factual situation in this case and "is not to be taken as prejudging the legality of union conduct not here litigated." Yet the majority opinion expressly recognizes that organizational picketing by a union which does have a majority exerts the same "coercive force" on employees as the picketing in this case. And by specifically reserving the question whether that picketing too will be found unlawful under the new theory of coercion adopted in this case, the majority casts doubt upon the legality of peaceful picketing in an area previously thought legal beyond any possible doubt. Furthermore, the logical consequences of the theory of coercion here adopted cannot be avoided unless the majority intends to ignore this case as precedent and leave the law in a chronic state of uncertainty. And despite the majority's protest as to the limited nature of its decision, in the companion case, *Alloy Mfg. Co.*, Case No. 19-CB-430, it extends the unwarranted coercion theory from picketing activity to the mere act of inclusion of an employer on a "we do not patronize" list. Such conduct, my colleagues' reason, contains the same threats to the employees' livelihood as does picketing, and when directed toward their selection of a bargaining agent affects rights under Section 7 and constitutes coercion within the meaning of Section 8(b)(1)(A). Thus the unreasonable and far-reaching consequences of this decision become more obvious.

The majority's erroneous interpretation of Section 8(b)(1)(A) seems to be prompted in large part by its desire to censure the union's conduct and find some section which can be utilized to ban it. Thus the majority opinion states: "Either the Union has violated Section 8(b)(1)(A) here or

its attempt to cause Curtis Brothers to commit an unfair labor p... is not wi... the purview of this statute;" and the concurring opinion states, "Picketing designed to accomplish a result specifically made unlawful by the Act must, itself, be unlawful."[52] Understandable though the majority's motive may be it cannot justify Board action amending the statute. The Board may not adopt a theory which will serve to ban peaceful activity beyond the proscription of the Act. The question here is not a moral or philosophical one of whether peaceful picketing in the circumstances of this case is good or bad and should or should not be permitted. The only question is whether Congress has proscribed it by Section 8(b)(1)(A). Moreover, I would point out that any implied suggestion in the majority opinions that unless Section 8(b)(1)(A) is held to outlaw the picketing in this case, the policy of the Act to permit employees freely to choose a bargaining agent will be aborted, is simply not so. Picketing may result in persuading employees to join a union as well as exerting pressure on an employer to recognize a union. The effect of picketing on employees is the same regardless of whether the picketing is labelled "organizational" or "recognition." Only if at the moment of recognition a union has not yet succeeded in

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[52] Note, however, that while the original House Bill (HR 3020) in Section 12(a) (3) (C) (iii) provided that it should be an unlawful concerted activity "to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law," this provision was not enacted in the final law. House Conference Report No. 510 on HR 3020 (80th Cong., 1st Sess., p. 42 (1947)) indicates that Section 8 (b) (1) (A) "in its general terms covered all of the activities which were proscribed in Section 12 (a) (1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in other paragraphs of Section 12 (a)." But the Report significantly continues;

> While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the correspondent provision of the House bill, *participation* in *them*, as explained in the discussion of Section 7, *is not a protected activity under the Act.* . . . The conference agreement, while adopting Section 8 (b) (1) of the Senate amendment does not by specific terms contain any of these sanctions, but *an employee who is discharged for participating in them will not . . . be entitled to reinstatement.* (Emphasis supplied.)

persuading a majority of employees to join it, is the employer's recognition of the union a violation of Section 8(a)(2) the Act. And if this should occur the employees do not stand helplessly bound by a union not of their own choosing, but may file charges and obtain relief from the Board. From time to time the Board has cases where an employer has recognized a minority union and the Board has set aside contracts and enjoined the employer from recognizing it until certified. Only recently the Board had a case where a local of the same union involved herein also lost a Board election but nevertheless 3 months later because of fear of economic pressure the employer signed a union security contract with the Union although the Union did not claim to represent a majority and the employer knew that it did not. Sixteen individual employees filed charges against both the Union and the Employer. This Board found violations of Sections 8(a)(1)(2) and (3) by the Employer and Section (8)(b) and (1)(A) by the Union, set the contract aside, and ordered that the Union not be recognized until certified by the Board.

In their desire to condemn the object of the picketing here, my colleagues have, I fear, found a violation, and fashioned a remedy not contemplated by the Act. In so doing they have disregarded legislative history and precedent and substituted their own judgment for that of Congress. By adopting the theory of coercion devised to find a violation in this case they have made serious inroads into the basic right of employees to picket and strike and to publicize their labor disputes. Congress did not see fit to abolish the employees' right to self-help, and this Board has no authority to do so in the guise of interpreting Section 8(b)(1)(A). Such a decision is, in fact, an amendment of the Statute.

Dated, Washington, D. C., October 30, 1957.

Abe Murdock, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE

TO ALL MEMBERS OF DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARLHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT restrain or coerce the employees of CURTIS BROTHERS, INC., in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all of the activities guaranteed thereunder.

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

IR-980.
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

and

CURTIS BROTHERS, INC.

Thomas W. Kennedy, Esq., for the General Counsel.
Thomas X. Dunn, Esq., of Washington, D. C., for the Union.
Harry E. Taylor, Jr., Esq., of Washington, D. C., for Curtis Brothers, Inc.

Before: *Sidney Lindner*, Trial Examiner.

Case 5-CB-190
(Post 5-CC-59)

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge duly filed by Harry E. Taylor, Jr., attorney for Curtis Brothers, Inc., herein called Curtis, the General Counsel of the National Labor Relations Board, by the Regional Director for the Fifth Region (Baltimore, Maryland), issued a complaint dated May 17, 1956, against Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, hereinafter alternatively called the Union and the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of

Section 8(b)(1)(A) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

With respect to the unfair labor practices, the complaint alleged in substance, that Respondent Union since on or about October 13, 1955, and up to and including the date of issuance of the complaint herein has not been designated or selected by a majority of the employees of Curtis in a unit appropriate for the purposes of collective bargaining and has not been and is not the exclusive representative of such employees within the meaning of Section 9(a) of the Act; that since on or about October 13, 1955, to and including the date of the issuance of the complaint herein the Union by its officers, agents, and representatives has caused pickets to patrol at and near the premises of Curtis for the purpose of causing, forcing, or requiring Curtis to recognize Respondent Union as exclusive bargaining representative and to enter into a contract with Respondent Union notwithstanding the fact that Respondent Union is not and since October 13, 1955, has not been such representative; that by the economic coercion of its picketing under the circumstances as set forth above, Respondent Union has restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

The Respondent Union's answer duly filed admitted that since October 13, 1955, up to and including the date of the issuance of the complaint herein, it has not been designated or selected by a majority of the employees of Curtis within the meaning of Section 9(a) of the Act and for that reason for the past several months it has been carrying on a legitimate organizational campaign by picketing the premises of Curtis for the purpose of becoming the exclusive representative of such employees. In all other respects the answer generally denies the commission of any unfair labor practices.

Pursuant to notice a hearing was held in Washington, D. C., on June 25, 26, and July 3, 1956, before the undersigned Trial Examiner. The General Counsel, the Respondent Union, and the charging party were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The parties were given the opportunity to present oral argument before the Trial Examiner and to file briefs and proposed findings of fact and conclusions of law. Briefs were received from the General Counsel and from counsel for the Respondent Union on September 18, 1956, and have been duly considered.

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of Curtis Brothers, Inc.

Curtis Brothers, Inc., is a corporation duly organized under and existing by virtue of the laws of the State of Delaware. It has at all times material herein maintained its principal office and place of business in Washington, in the District of Columbia, where it is and has been engaged in the business of moving, storage, rug cleaning, and retail furniture operation. During the 12-month period from June 1955 through May 1956, a representative period, Curtis in the course and conduct of its business operations as described above purchased materials and supplies in the amount of $914,068 of which $826,530 in purchases were purchased and shipped from points outside the District of Columbia to the Curtis place of business in Washington, D. C. During the same period Curtis performed services and sold products having a value of $1,480,098 of which $718,089 represents sales of products sold and delivered outside the District of Columbia. I find that Curtis Broth-

ers, Inc., is engaged in commerce within the meaning of the Act.

II. The labor organization involved

Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, is a labor organization admitting to membership employees of Curtis Brothers, Inc.

III. The unfair labor practices

Background

In September 1953, the Board certified the Union as the exclusive bargaining agent in a unit consisting of Curtis' drivers, helpers, warehousemen, and furniture finishers (Case No. 5-RC-1325).

Following the issuance of certification, Curtis and the Union entered into negotiations for a collective bargaining contract. After three bargaining sessions between the parties, agreement was reached on everything with the exception that when Curtis rejected the Union's proposal for a union-shop clause, an impasse resulted.

On the morning of February 26, 1954, the Union called a strike and began picketing the Curtis furniture store and the warehouse[1] with signs which carried the following inscription:

CURTIS BROTHERS ON STRIKE
UNFAIR TO ORGANIZED LABOR
DRIVERS, HELPERS, AND WAREHOUSEMEN
OF LOCAL 639 (AF OF L)

The pickets included among others 9 employees of the approximately 21 in the unit represented by the Union, as

[1] The retail furniture store is located at 2041 Nichols Avenue, S. E., between U and V Streets, and the two warehouses denoted as numbers 3 and 5 are on opposite sides of V Street, west of Nichols Avenue between Nichols Avenue and Shannon Place. See Trial Examiner's Exhibit 1.

well as union officers and members. At the outset there were some 15 to 20 pickets at any one time who picketed in front of the store and in front of the warehouse. The picketing continued through February 16, 1955. At some time during this period the number of pickets was reduced to an average of 6 at any given time. Curtis in this interim period hired replacements for the 9 striking employees.

On or about February 1, 1955, Curtis filed with the Board a petition under Section 9(c) of the Act, docketed as Case No. 5-RM-281, covering the same unit of employees as heretofore described.

Under date of February 16, 1955, the Union in a letter over the signature of L. A. Trainham, its recording secretary and business agent, addressed to John Penello, the Regional Director of the Board's Fifth Region, "abandoned all claims to exclusive recognition of the majority bargaining representative" for the employees in the appropriate unit; set forth that it did not claim the right of majority representation of the said employees; and expressly disclaimed the right to be the exclusive bargaining representative for such employees.

On February 17, 1955, the Union did not carry on any picketing activities at Curtis, but resumed its picketing on the next day, February 18, 1955, up until the date of the hearing herein, with changed picket signs which read: "CURTIS BROS. Employs Non Union DRIVERS, HELPERS, WAREHOUSEMEN, ETC. UNFAIR TO TEAMSTERS UNION No. 639 AFL." The reverse side of the sign read: "TEAMSTERS UNION No. 639 AFL WANTS EMPLOYEES OF CURTIS BROS. To Join Them To Gain Union Wages, Hours And Working Conditions."

On February 28, 1955, a hearing was conducted in Case No. 5-RM-281 following which the Board on September 20, 1955, issued its Decision and Direction of Election, in which it found: . . .

. . . that the Union's current picketing activities cannot be reconciled with its disclaimer of interest in representing the employees in question. In the light of all the material facts of this case including the certification of the Petitioner, the circumstances preceding the strike, the nature of the first signs carried by the pickets, the brief discontinuance of picketing, and its early resumption, we are convinced that the current picketing is not for the sole purpose of getting employees to join the Union, as the more recent picket signs indicate, but is tantamount to a present demand that the Employer enter into a contract with the Union without regard to the question of its majority status among the employees concerned.[5] Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[5] Cf. *Swee-T-Shirts, Inc.*, 111 NLRB 377; *Francis Plating Co.*, 109 NLRB 35; and *Petrie's, an Operating Division of Red Robin Stores, Inc.*, 108 NLRB 1318. Although Member Peterson dissented in the last case, he deems himself bound by the decision of the majority therein.

Contrary to the Union, we do not regard as controlling herein the *Hubach and Parkinson Motors* case 88 NLRB 1022, where the Board gave effect to a union disclaimer and found no question concerning representation to exist. There, unlike the instant case, substantially all the strikers had been replaced during the strike and before the Union's disclaimer.

The Board ordered an election conducted among Curtis' employees in the same unit in which the Union had previously been certified. The vote was 28 to 1 for "No Union." On October 13, 1955, the Board issued its Certificate of Results certifying that no labor organization represented the employees involved.

The Picketing Activities During the 6-month Period prior to the Filing of the Charge

The original charge in this case docketed under Case No. 5-CC-59 was filed on April 13, 1956, alleging that the Union was engaging in unfair labor practices within the meaning

of Section 8(b)(1), 8(b)(4)(A), and 8(b)(4)(B). On May 14, 1956, an amended charge was filed in Case No. 5-CB-190 (Post 5-CC-59) alleging that the Union was engaging in unfair labor practices within the meaning of Section 8(b) 1(A).

From about November 1955 to the date of the hearing herein, no more than two stranger pickets (never employed by Curtis) at any one time patrolled in front of the retail furniture store on Nichols Avenue from about 8:30 a.m., until the store closed at 9 p.m. The unit employees worked from 8 a.m., until 5 p.m., and reported and checked out at the employees' entrance in warehouse No. 3 on V Street. The pickets did not talk to the employees,[2] nor did they distribute literature. The picketing at all times was peaceful.

Analysis and Conclusions

The General Counsel contended at the hearing and in his brief that the Union's continued picketing herein was for recognition. His theory of the case is that recognition picketing carried on by a union with strangers, where the union represents only a minority of the employees, constitutes a violation of Section 8(b)(1)(A) of the Act, since such continued recognition picketing explicitly or implicitly threatens employees with economic loss or injury, thereby restraining and coercing them in the exercise of their right not to join a union guaranteed by Section 7 of the Act.

The Union's defense among others is that the picketing herein was peaceful and for organizational purposes which is protected under Section 7 of the Act; that the fact that there was embarrassment and discomfort, or even economic

[2] Trainham testified that his instructions to the pickets were "Keep their picket duty, keep their nose clean and to talk to nobody, especially the bosses or nobody else." Charles Fuller, a union organizer, testified that he talked to employees about union organization in a drugstore or bowling alley or restaurant a short distance from the Curtis store.

loss to the employer is the natural concomitant to organization picketing; and that peaceful picketing whether for organizational or recognition purposes after the Board's certification of the "no-union" vote does not restrain or coerce employees within the meaning of Section 8(b)(1)(A) of the Act.

Since the General Counsel's theory has as its base that the picketing is for recognition purposes and in view of the diametrically opposed contentions regarding the characterization of the picketing, the first issue posed by the contentions concerns the picketing herein. Was it organizational or for recognition purposes?

While I am aware that the Board particularly in representation cases involving disclaimers by unions has made the distinction between organizational and recognition picketing (see, for example, the Decision and Direction of Election in the representation case involving the very parties in the present case, *Curtis Brothers, Inc.*, 114 NLRB 116, and cases cited in footnote 5 therein), it appears as one authority [3] stated:

> . . . too much confusion has been created by the often meaningless distinction made between "organization" and "recognition" picketing.
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> • • •
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> Obviously, both organizational and recognition picketing point to a common objective. In each instance the picketing represents an attempt on the part of the union to isolate a non-union employer and to solidify its bargaining position within an industry. The objective is the same: that is, to have the employees of such an employer as members of the union and to have the employer operate under a union agreement.

The General Counsel aptly notes in his brief that "whatever the relative merits concerning any valid ultimate dis-

[3] Stephhen C. Vladeck, Organization and Recognition Picketing, New York University, Eighth Annual Conference on Labor, p. 207.

tinction between recognition and organizational picketing, it is, at least, reasonably clear that picketing normally designated as recognition is the broader or more inclusive term of the two, and apart from other objectives, at least embraces all the purposes inherent in organizational picketing. . . ."

I find it unnecessary to determine whether the picketing herein was organizational or for recognition purposes, for I am satisfied that even assuming *arguendo* that the General Counsel's contention regarding recognition picketing is correct, he must be found wrong on the law. I shall assume, therefore, for the purposes of further discussion that the picketing herein was for recognition.[4]

The General Counsel argued at the hearing that recognition picketing as it existed at Curtis can be eliminated only through one of two ways, either capitulation by Curtis to the extent that it signs a contract with the Union and forces the employees to join, in spite of their overwhelming "no-union" vote at the Board-conducted election, or by continued picketing forcing the employees themselves to capitulate and join the Union against their own wishes,

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[4] The General Counsel adduced evidence from Archie Curtis that until the middle of November 1955 he observed pickets recording license numbers of trucks as drivers approached the warehouse and that up until March or April 1956 he observed pickets scratch a mark on their picket signs when customers entered the store. George Curtis testified that on six occasions since October 1955 he observed trucks pull up in front of the store on Nichols Avenue (a heavily traveled thoroughfare), a picket go over to the truck, talk to the driver and then the driver would proceed up Nichols Avenue away from the store. He did not know the trucking companies involved. He could not identify the pickets or testify as to their conversations with the truckdrivers. The General Counsel in his brief contends that this evidence which shows activity of the pickets over and above their walking in front of the store with picket signs, buttresses his conclusion that the picketing was more than organizational and was for the purpose of coercing the employer and through him the employees. The testimony of the Curtis was very general, vague, and lacking in detail. In view of the fact that I will treat the picketing, for the purposes of this case, as recognition picketing, I will not make a finding on the testimony of Archie and George Curtis.

through the threat whether implicit or direct, that their jobs and livelihood may well be affected unless they join.

Elaborating further in his brief the General Counsel makes the following contentions: (1) that the calculated purpose of the picketing herein was to force or economically coerce Curtis into recognizing the Union and signing a contract with the Union irrespective of the employees' wishes with respect to their selection of a bargaining agent; (2) that this picketing was designed to put economic pressure on Curtis to force it to coerce its employees into joining the Union; (3) that the picketing was intended to exert direct economic coercion on the employees to join the Union in order to protect their jobs; and (4) such indirect economic pressure through Curtis and the direct economic coercion towards the employees themselves is restraint and coercion in violation of Section 8(b)(1)(A) of the Act.

Before proceeding to a discussion of the cases in which the Board has dealt with problems of recognition strikes and picketing, alleged by the General Counsel as violations of Section 8(b)(1)(A), it might be well to note at this point that there is inherent in all picketing, the economic possibility of a loss of business to an employer, with a resultant loss of jobs or earnings to his employees.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization or its agents:

> To restrain or coerce employees in the exercise of rights guaranteed in Section 7.

The terms of this provision are broad. The question we must answer is, did Congress intend the terms "restrain" and "coerce" to be as broad as the General Counsel here contends so as to encompass the situation before us in this case?

The first case in the Board's Decisions involving the scope of Section 8(b)(1)(A) is *National Maritime Union of America, et al.*, 78 NLRB 971, which contains an exhaustive

study of the legislative history. There the Board majority stated:

Section 8(b)(1)(A) of the Act originated in the Senate as Bill (S. 1126), as originally reported to that body by the Senate Committee on Labor and Public Welfare, did not contain any provision making it an unfair labor practice for a labor organization to restrain or coerce employees. Senators Ball, Taft, Donnell, Jenner, and Smith, in a supplemental statement to the Senate Committee's report on the bill, declared that they would introduce an amendment to this effect on the floor of the Senate. Explaining why they would do so, they said:

> Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of *union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence.* Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act. We believe that the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer. [Emphasis supplied.] (*Sen. Rep.* No. 105, 80th Cong., 1st Sess., p. 50.)

On the floor of the Senate, Senator Ball proposed an amendment to the Senate bill, making it an unfair labor practice for a labor organization or its agents "to interfere with, restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. In an accompanying explanation he said:

> *The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in*

them, would be unfair labor practices, such as making threats or false promises or false statements, the union also shall be guilty of unfair labor practices. [Emphasis supplied.] (*Cong. Rec.*, April 25, 1947, p. 4136.)

The words "to interfere with" were deleted from the amendment with the consent of Senators Ball and Taft, after Senator Ives had expressed the fear that these words "could easily be construed to mean that any conversation, and persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice." (*Cong. Rec.*, April 25, 1947, p. 4136.)

The Act contains no definition of what constitutes "restraint" or "coercion," but during the course of the debate the principal sponsors of the amendment gave examples of the types of conduct that the amendment was intended to reach. The following colloquy between Senators Saltonstall and Taft is particularly illuminating:

> MR. SALTONSTALL. . . . I would appreciate very much, in order to make the matter clear in my own mind, if the Senator from Ohio [Taft] would give an example of a restraint he would consider an unfair labor practice, an action which would not be a restraint, an action which would be coercion, and an action which would not be coercion, within the meaning of the words of the bill and the amendment.
>
> MR. TAFT. Answering the Senator from Massachusetts, I would say, in the first place, that I understand the present section against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence, . . .

In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed-shop agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. I think when we get to the case of unions, there might be the actually violent act of forcibly, by mass picketing, preventing a man from working.

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be restraint and coercion against those employees, and interference with their right to work. . . .

The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment. [Emphasis supplied.] (*Cong. Rec.*, May 2, 1947, p. 4561-4562.)

During the debate, Senator Ball said of the amendment: "What we are trying to reach here, it seems to me, is *the coercive activity in which some unions and their agents indulge in their organizational and election campaigns. . . .*" [Emphasis supplied.] (*Cong. Rec.*, May 2, 1947, p. 4560.) Senator Ball expressed the same thought as to the purpose of the amendment in a radio broadcast which he delivered during the pendency of the Taft-Hartley bill before Congress: ". . . the only purpose [of Section 8(b)(1)(A)] is to protect the rights of employees, *to free them from the coercion of goon squads and other strong-arm organizing*

techniques which a few unions use today." [Emphasis supplied.]

In answer to Senator Morse's observation that the amendment would outlaw all strikes to further organization activities, Senator Taft stated:

> . . . I can see nothing in the pending measure which, as suggested by the Senator from Oregon [Morse], would in some way outlaw strikes. *It would outlaw threats against employees. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.* [Emphasis supplied.] (*Cong. Rec.*, May 2, 1947, p. 4563.)

This legislative history strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join. • • • Nor is there any suggestion in the legislative history of Section 8(b)(1)(A) that "coercion" and "restraint" may be found to flow automatically from a union's violation of Section 8(b)(2) where, as in this case, the efforts of the union were not directed against a particular individual or group of individuals, and constituted merely an *attempt* to cause the employer to discriminate within the meaning of Section 8(b)(2).

We are mindful of the fact that the Respondent's strike had as its purpose the accomplishment of an illegal objective; but we are not prepared to say, as the General Counsel and the Trial Examiner did, that a strike for an illegal objective necessarily "restrains" and "coerces" employees, as those terms were intended to be applied in Section 8(b)(1)(A). The touchstone of a strike which is violative of Section 8(b)(1)(A) is normally the *means* by which it is accomplished, so long as its objective is directly related to the

interests of the strikers, and not directed primarily at compelling other employees to forego the rights which Section 7 protects. It is true, of course, that had the strike in this case succeeded and had contracts containing the hiring-hall clause been executed, seamen who were not NMU members would be required to join NMU or suffer the discrimination which the hiring hall entails. But this strike, though violative of Section 8(b)(2), had as its *prime* objective the protection of the employment interests of NMU members, and not the coercing of nonmembers to join the union. As such, and having been peacefully conducted, we find that it did not violate Section 8(b)(1)(A).

In our view the position taken by our dissenting colleague places too much emphasis on the admitted fact that the action of the Respondents, had it succeeded, would ultimately have subjected some seamen to discrimination. Mr. Gray's reasoning, carried to its logical conclusion, would require outlawing practically any strike opposed by some employees. If a group of employees were to strike for recognition in the absence of an established bargaining representative, and other employees were to oppose the strike, the strike would violate the Act, under Mr. Gray's reasoning, because it would interfere with the statutory right of the opposing employees not to join a labor organization and not to bargain collectively. As we have seen, however, Senator Taft expressly disclaimed that this would be the effect of Section 8(b)(1)(A).

In the *Perry Norvell Company* case, 80 NLRB 225, the General Counsel there contended that a strike by some employees was in violation of an agreement between the company and Boot and Shoe Workers Union, Local 613, AFL,[5] that the purpose of the strike was to abrogate the existing agreement and to compel the company to bargain with a

[5] The contract between Local 613 and the Company was entered into on January 13, 1947, for the period ending December 31, 1947. The strike took place on August 2, 1947.

committee of employees instead of with Local 613 during the contract term, and if the company had acceded to the committee's demands it would have violated Section 8(a)(5) and 8(d) of the Act. It was further contended by the General Counsel in *Perry Norvell* that regardless of the methods used and even if they happened to be themselves lawful, a strike for such purpose is *per se* an unfair labor practice in violation of Section 8(b)(1)(A), because it deprives employees of the rights guaranteed them under Section 7 of the Act, particularly the right to bargain collectively through representatives of their own choosing. The Board adverting to the detailed account of the legislative history of Section 8(b)(1)(A) set out by it in the *National Maritime Union* case, *supra*, found that the strike did not violate Section 8(b)(1)(A). In its decision it stated:

> Section 8(b)(1)(A) was not intended to have the broad and almost limitless reach which the General Counsel urges upon the Board. The legislative history of the Act shows that by this particular section, Congress primarily intended to proscribe the *coercive conduct* which sometimes accompanies a strike, but not the strike itself.[25] By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal.[26] In that section, Congress was aiming at means, not at ends.
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> • • •
>
> . . . Congress, by another section, specifically made it an unfair labor practice for a labor organization to strike to force an employer to recognize one labor organization when another had been *certified* by the Board under the provisions of Section 9(a).[28] Local 613 was never certified so Section 8(b)(4)(C) cannot

[25] For a detailed account of the legislative history of Section 8 (b) (1) (A) of the Act, see *Matter of National Maritime Union of America*, 78 NLRB 971.

[26] *Matter of National Maritime Union of America*, 78 NLRB 971.

[28] Section 8 (b) (4) (C).

be here invoked; the General Counsel, barred from invoking it by this fact, has turned to Section 8(b)(1)(A) instead. But we conclude that Congress did not intend *either* section to declare it an unfair labor practice to strike for recognition in the absence of a certification.

* * *

Finally, the logic of the General Counsel's contention that the present strike is, in and of itself, an unfair labor practice, would require the outlawing of practically any strike opposed by some employees. The impact of a strike on employees who disapprove the strike is the same, regardless of its purpose. Hence, if some employees should strike for recognition in the absence of any bargaining representative, and other employees should oppose the strike and the union calling the strike, the strike would perforce be an unfair labor practice under the General Counsel's reasoning, because the strike would interfere with the right of some employees not to join a labor organization and not to bargain collectively, as guaranteed by Section 7. However, during the course of debate on the bill, Senator Taft expressly *denied* that Section 8 (b)(1)(A) would have this effect.[30]

[30] 93 Daily Cong. Rec. 4563 (May 2, 1947).

In his brief in the instant proceeding the General Counsel points out that the important fact is that the Union represents "a small minority," whereas in *Perry Norvell* the strike was "apparently supported by a majority."

While the Board in *Perry Norvell* decision did not explicate in so many words that the strike was one for recognition by a minority, it is noted that the briefs to the Board submitted by the General Counsel and counsel for Perry Norvell Company brought this fact to the Board's notice (General Counsel's brief, pp. 31, 32; Company's brief, pp. 62, 95). Indeed, the Board in its Fourteenth Annual Report submitted to Congress and to the President as provided in Section 3 (c) of the Act, reporting among other things, the

decisions it rendered, had the following to say (p. 83) regarding its *Perry Norvell* decision:

> The Board also found no merit in the contention that a strike of a dissident group in violation of a no-strike clause,[23] and *non-violent attempts by a minority to unseat an incumbent union*[24] *constituted violations of Section 8 (b) (1) (A).* [Emphasis supplied.]

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[23] *Matter of Perry Norvell Company, supra.*
[24] *Ibid.*

See also, Report of the Joint Committee on Labor Management Relations, Committee Print No. 986, part 3, 80th Cong., 2nd Sess. 85:

> Another instance of a strike to force an employer to violate the law is a strike by a minority group of employees for recognition. It seeks to deprive employees of their rights under Section 7 of the Act, . . . If an employer accedes to such demand, he participates in forcing his employees to bargain collectively through an agent to which a majority of them are opposed. That such a strike is not an unfair labor practice under the present act has been made clear. In *Matter of Perry Norvell,* (80 NLRB No. ——, 23 LRRM 1061, Nov. 12, 1948) the Board held that a *strike by a minority group for recognition, where another union was recognized agent, did not constitute "restraint or coercion" of the employees in violation of Section 8 (b) (1) (A).* In other words, the Board held that the strike did not restrain or coerce the employees in the exercise of their right to choose their own bargaining representative or to refrain from choosing one, although its object was to force them to choose an agent to which a majority of them were opposed. [Emphasis supplied.]

The Board has adhered to its policy set forth in *Perry Norvell,* in subsequent decisions dealing with conduct proscribed by Section 8 (b) (1) (A). Thus in *Miami Copper Company,* 92 NLRB 322, the Board reaffirmed its interpretation of the meaning of the terms "restrain or coerce," stating that:

> Section 8 (b) (1) (A) was intended to eliminate physical violence, intimidation and threats of economic action against employees. Where the Union's conduct involved violence, threats thereof, or related conduct, although the Union had obtained or was attempting to obtain economic discrimination against particular employees, we have found such conduct proscribed by Section 8 (b) (1) (A).

The Board held that none of these elements were present in that case even though a minority union exerted economic pressure in the form of threats of strike action and actually engaged in a work stoppage in order to force the employer to adjust grievances in the absence of the certified representative. The Board further held that:

> Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, . . . to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A).

In *United Construction Workers et al.*, 94 NLRB 1731, the Board held that any pressure exerted against employees in order to be in conflict with Section 8 (b) (1) (A) must be direct.

While the General Counsel in his brief contended that the picketing herein was intended to exert direct economic coercion on the Curtis employees in order to protect their jobs, he did not adduce any evidence to prove that the Union's conduct directly threatened or intimidated the employees in the exercise of their rights guaranteed in Section 7, and I so find.[6]

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[6] While I am mindful of the fact that the Board has held that an employer's conduct calculated, or tending to interfere with, restrain or coerce its employees in rights guaranteed by Section 7 of the Act is no less violative of Section 8 (a) (1) because such conduct may not have achieved its purpose, see *Rubin Bros. Footwear, Inc.*, 91 NLRB 1, nevertheless, as noted above, to be in conflict with Section 8 (b) (1) (A), pressure exerted against employees must be direct. In this regard the comment of Respondent's counsel in his brief is worth noting: "The folly of General Counsel's position that these employees were coerced and restrained is pointed up by the results of the Board's con-

In the *Medford Building and Construction and Trades Council* case, 96 NLRB 165, the Board held that picketing and threats of economic action to compel an employer to consent to an illegal-security arrangement was violative of Section 8 (b) (2). Citing again *National Maritime Union* it declined to find that such conduct restrained or coerced the employees in violation of Section 8 (b) (1) (A), because it was directed against the employer and not against the employees.

In *Painters' District Council No. 6 (the Higbee Company)*, 97 NLRB 654, the Board was called upon to determine whether a strike or picketing called for the purpose of inducing employees to withdraw their petition for decertification[7] of the incumbent bargaining agent, unlawfully restrained and coerced employees in violation of Section 8 (b) (1) (A). In that case the Trial Examiner found that the "strike" was called not only for the purpose of inducing the employees to withdraw the decertification petition but additionally that "its essence and fundamental purpose was to preserve the organizational and bargaining status then enjoyed by the Union," *in other words for continued recognition.* It is interesting to note *in that case as in the instant case, the picketing was peaceful and was carried on by persons other than employees (strangers).* (Emphasis supplied.)

The Board adopting the rationale of the Trial Examiner's conclusion that the union's fundamental purpose in calling the "strike" was to preserve its bargaining status, and the union's right to take action for that purpose was protected by Section 7 equally as much as the right of employees to

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ducted election. Curtis Bros. employees were so fearful of Local 639's picketing threatening loss of their jobs that they voted 28 to 1 against the same local." It will be recalled that the picketing had been going on for some 18 months before the Board election was held.

[7] Seven of the eight men employed (all but the union steward) signed a statement that they no longer wished to be represented by the union, and asked the Board to conduct an election and decertify this union.

file a decertification petition and to abstain from union membership and activity, found that the "strike" or picketing was not unlawful. Further, the Board held in agreement with the Trial Examiner, that if the "strike" were held to have unlawfully restrained employees in the exercise of Section 7 rights, any strike for recognition would similarly violate Section 8 (b) (1) (A), and Congress, except for the narrowly defined activity regulated by Section 8 (b) (4) (C), left unrestricted the right of a labor organization to engage in a recognition or maintenance-of-recognition strike.

The Board further stated in its decision:

> The evidence in the record indicates that there may in fact have been no "strike"—in the usual sense of a cessation of work by employees of the Company, *but rather union picketing of the Company's premises by persons other than its employees.*
>
> In any event, we find, for the reasons set forth in the Intermediate Report, that by such strike or picketing alone the Respondents did not violate Section 8 (b) (1) (A). (Emphasis supplied.)

It is also interesting to note in the *Higbee Company* case that the impact of the picketing was aimed directly at the employees, for only the employees could withdraw the decertification petition, which they previously filed. In the case at bar, the picketing did not have such direct impact against Curtis employees. Yet in *Higbee* the Board held such direct action by the union did not constitute a violation of Section 8 (b) (1) (A).

Bearing in mind the edict of the Supreme Court in *N. L. R. B.* v. *International Rice Milling Co.*, 341 U. S. 665: "By Section 13 Congress has made it clear that . . . *all* : . . parts of *the act* which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution (i. e. the right to strike) is 'specifically provided for' in the Act," it might be well at this

juncture of the report to ask in what situations did Congress intend to curtail picketing and strikes for recognition?

The legislative history of the Act indicates that Congress gave detailed consideration to the problem of peaceful picketing for recognition or organization purposes by, or on behalf of, a union representing none or a minority of the employees;[8] that it had before it several proposals that would have outlawed such activities in its entirety.

In original H. R. 3020, as passed by the House, there was contained Section 12 (a) (2) which provided as "unlawful concerted activities:"

> Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer in any case in which the employees are not involved in a labor dispute with their employer.

and Section 12 (a) (3) (C) which provided that it was unlawful to call, authorize, engage in, or assist in

> any strike or other concerted interference with an employer's operations an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law.

These amendments of H. R. 3020 did not become law.

The amendments finally adopted proscribed the activity only when it entailed the form and objectives specified in Section 8 (b) (4) (B) and (C).

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[8] See Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong. 1st Session, 282, 347-348, 552-553, 1858; Hearings before the House Committee on Education and Labor on Bills to Amend the Repeal the National Labor Relations Act, 80th Cong., 1st Session, 228, 474-476, 492, 548-549, 704-705, 710-711, 723, 993, 1884-1885; 93 Cong. Rec. 1844, 1846, 1935, 3425, 3449, 3528, 3636, 3660, 3667, 3838, 4431, 4436, 4840, 4905, 7533.

In (B) of the above Section, Congress said it would be unlawful for a union to "induce or encourage" the employees of an employer to strike, the purpose of which was to force "any other employer" to bargain with the union unless the union was certified as the representative of those employees.

Again in Section (C), Congress said that it was unlawful for a union to "induce or encourage" employees of an employer, the purpose of which is to force "any employer" to bargain with the union in the face of certification granted to another labor organization.

In fact, in House Conference Report No. 510, 80th Cong., 1st Session, 43, in 1 Leg. Hist. 547, it is stated of Section 8 (b) (4) (B):

> Clause (B) of this provision of the Senate amendment covered strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. *It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited.* Moreover, strikes and boycotts for recognition were not prohibited if the union had been certified as the exclusive representative. (Emphasis supplied.)

Furthermore the Supreme Court in *Garner* v. *Teamsters Union*, 346 U. S. 485, noted that the policy of the amended Act was not to condemn all picketing and that the "detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint."

Consistent with the legislative history as set out above, the Board in *District 50, United Mine Workers, (Tungsten Mining Corporation)*, 106 NLRB 903, held that the Union did not violate Section 8 (b) (1) (A), solely by reason of the calling of a strike and picketing for recognition in violation of Section 8 (b) (4) (C). Again citing *National Mari-*

time Union, and *Perry Norvell,* it stated "a violation of Section 8 (b) (4) (C) of the Act is not *per se* a violation of Section 8 (b) (1) (A)."

When we compare the *District 50, United Mine Workers* case with the instant case we find as counsel for the Respondent points out in his brief; "In one instance the employees have indicated a preference for a specific union, in the other they have indicated preference for no-union."

Can it be said that picketing or striking in the face of a no-union vote has a more coercive and restraining effect on employees, than a strike or picketing in the face of a certified bargaining representative? The contention of Respondent's counsel "that on the basis of reasoning of the cases in which the Board has found picketing in the face of a certification does not, *per se,* 'restrain and coerce' employees—it must be held that peaceful picketing in face of a 'no-union' vote also does not, *per se,* 'restrain and coerce' employees in the exercise of their rights under Section 7 of the Act not to join a union," appears to have merit.

In line with this contention consider the statements in the Report of the Joint Committee on Labor Management Relations, No. 986, part 3, 80th Cong., Second Sess., 70-71:

> The Taft-Hartley Law's only limitation upon such strikes [recognition] is that provided by Section 8 (b) (4) (C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.
>
> A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.
>
> * * * *
>
> Present law in no way limits the primary strike for recognition except in the face of another union's certification.[9]

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[9] The General Counsel in his brief argues that "not only is the above *not* part of the actual legislative history of Section 8 (b) (1) (A), but rather

The General Counsel in his brief has cited a number of Supreme Court decisions [10] where the court held that picketing is something more than free speech, and upheld as constitutional, State injunctions of peaceful picketing which was undertaken for unlawful objectives or purposes in contravention of State policy. These cases are inapposite to the situation herein for we are not here concerned with the constitutionality of certain State laws, as were involved in those cases, but rather with whether Section 8 (b) (1) (A) of this Federal Act is violated by the conduct under consideration in this case.

All of the arguments and contentions urged upon me by the General Counsel have been carefully considered by the Board and the Courts and have been rejected as pointed out in detail above.

In my opinion, what the General Counsel seeks to accomplish in this proceeding can be brought about only by an amendment to the Act. If the Congress wishes to sound the death knell to peaceful, recognition picketing by a minority because of the economic pressures such picketing exerts on an employer, it of course, may do so, but it may not be done by administrative fiat. As the New York Court of Appeals stated in *Wood* v. *O'Grady*, 307 N. Y. 532; cert denied 349 U. S. 939, "It is axiomatic that we may not, under the guise of interpretation, import into a statute conditions or criteria which the legislature has been careful to omit." See also *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355.

Indeed, the Joint Committee on Labor Management Relations whose function among others was the study and in-

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it is *post*-legislative history in which the Senate Committee also was considering the fact of Board decisions already interpreting Section 8 (b) (1) (A)." The short answer to this contention is that the Supreme Court was not the least reluctant to cite this *post*-legislative history in *U. M. W.* v. *Arkansas Oak Flooring Company*, 51 U. S. 62.

[10] *Gibboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Hughes*, et al v. *Superior Court*, 339 U. S. 460; *International Brotherhood of Teamsters* v. *Hanke, et al*, 339 U. S. 470.

vestigation of "the administration and operation of existing Federal laws relating to labor relations" considered the problems we have in the instant case and was also of the opinion that to achieve the objective here sought by the General Counsel, the Act would require amendment.[11]

In view of the foregoing and upon the entire record I will recommend that the complaint herein be dismissed in its entirety.

Conclusions of Law

1. The operations of Curtis Brothers, Inc., constitute and affect trade, traffic and commerce among the several States within the meaning of Section 2 (6) and (7) of the Act.

2. Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. The Respondent, Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, has not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case I recommend that the complaint be dismissed in its entirety.

Dated at Washington, D. C., this day of November 1956.

Sidney Lindner
Trial Examiner

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[11] Report of the Joint Committee on Labor Management Relations, Committee Print No. 986, Part 3, 80th Cong., 2nd Sess., 86-87. See also address by Professor Archibald Cox, at the CIO Conference on Labor Law, December 9, 1954.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD

DRIVERS, CHAUFFEURS, AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO and CURTIS BROTHERS, INC.	Case No. 5-CB-190 (Post 5-CC-59)

ORDER CORRECTING DECISION AND ORDER

On October 30, 1957 the Board issued a Decision and Order[1] in the above-entitled proceeding in which there was an inadvertent omission.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, corrected by striking therefrom the words "which does have a majority" and substituting therefor the words "which does not have a majority" on page 40, the fifth line from bottom of page; and

IT IS FURTHER ORDERED that the said Decision and Order as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 1, 1957.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

[1] 119 NLRB No. 33.

EXHIBIT 1 E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

In the Matter of DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO and CURTIS BROTHERS, INC.	Case No. 5-CB-190 (Post 5-CC-59)

COMPLAINT

It having been charged by Curtis Brothers, Inc., that Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 29 USC, 1952, Secs. 141, *et seq.*, hereinafter referred to as the Act, the General Counsel of the National Labor Relations Board, hereinafter referred to as the Board, on behalf of the Board, by the Regional Director for the Fifth Region, designated by the Board's Rules and Regulations, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Respondent, Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a

labor organization within the meaning of Section 2, subsection (5), of the Act.

II.

Curtis Brothers, Inc., hereinafter referred to as the Company, is a corporation duly organized under and existing by virtue of the laws of the State of Delaware. The Company has at all times material herein maintained its principal office and place of business in Washington, in the District of Columbia, where it is and has been engaged in the cleaning of rugs and in the sale, moving, and storage of furniture.

During the calendar year 1955, a representative period, the Company, in the course and conduct of its business operations as described hereinabove, purchased materials and supplies of a value in excess of $500,000, over 75 percent of which was shipped direct to its Washington, D. C., place of business from points outside the District of Columbia. During the same period the Company performed services and sold products of a value in excess of $750,000, of which approximately 40 percent represents sales of products sold and delivered outside the District of Columbia.

III.

Curtis Brothers, Inc., is and has been at all times material herein engaged in commerce within the meaning of the Act.

IV.

On September 30, 1955, in an election conducted under the supervision of the Regional Director for the Fifth Region of the Board, pursuant to a Decision and Direction of Election of the Board in the Matter of *Curtis Brothers, Inc., and Drivers, Chauffeurs and Helpers, Local 639, A.F.L.*, Case No. 5-RM-281, among certain employees of the Company in a unit found to be appropriate for the purposes of collective bargaining by the Board, 28 votes were cast against Respondent and 1 vote was cast for Respond-

ent. On October 13, 1955, said Regional Director issued a Certificate of Results of Election certifying that no labor organization is the exclusive representative of such employees.

V.

Since on or about October 13, 1955, and up to and including the date of issuance of this Complaint, Respondent has not been designated or selected by a majority of the employees of the Company in a unit appropriate for the purposes of collective bargaining and has not been and is not the exclusive representative of such employees within the meaning of Section 9 (a) of the Act.

VI.

Since on or about October 13, 1955, to and including the date of the issuance of this Complaint, Respondent, by its officers, agents and representatives, has caused pickets to patrol at and near the premises of the Company.

VII.

Respondent picketed the Company's premises, as set out in Paragraph VI above, for the purpose of causing, forcing or requiring the Company to recognize Respondent as exclusive bargaining representative and to enter into a contract with Respondent, notwithstanding the fact that Respondent is not and since October 13, 1955, has not been such representative.

VIII.

Respondent, by the economic coercion of its picketing, as set forth in Paragraph VI above, under the circumstances as set forth in Paragraphs IV, V and VII above, has restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices within

the meaning of Section 8, subsection (b) (1) (A), of the Act.

IX.

The activities of Respondent, as set forth in Paragraphs IV, V, VI and VII above, occurring in connection with the operations of the Company, described in Paragraphs II and III above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, between the several states and the District of Columbia, and within the District of Columbia, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

X.

The aforesaid acts of Respondent, as hereinabove set forth, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsection (b) (1) (A), and Section 2, subsections (6) and (7), of the Act.

WHEREFORE, on this 17th day of May 1956, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused the Regional Director for the Fifth Region to issue this Complaint against Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, the Respondent herein.

JOHN A. PENELLO, Regional Director
National Labor Relations Board
104 W. Baltimore Street
Baltimore 1, Maryland

EXHIBIT 1 M

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

In the Matter of DRIVERS, CHAUFFERS AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO. and CURTIS BROTHERS, INC.	Case No. 5-CB-190 (Post 5-CC-59)

ANSWER TO COMPLAINT

Now comes respondent Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and in answer to the complaint filed herein, represents to the Board as follows:

1. Respondent admits the allegations contained in paragraph I of the complaint.

2. Respondent has no knowledge of the allegations contained in paragraph II of the complaint and neither admits nor denies said allegations but demands strict proof thereof.

3. Respondent has no knowledge of the allegations contained in paragraph III of the complaint and neither admits nor denies said allegations but demands strict proof thereof.

4. Respondent admits the allegations contained in paragraph IV of the complaint.

5. Respondent admits that since October 13, 1955 up to and including the date of the issuance of the complaint that respondent has not been designated or selected by a majority of the employees of Curtis Brothers, Inc., within the meaning of Sec. 9 (a) of the Act, for the reason that for the past several months respondent has been carrying on a legitimate organizational campaign by picketing the premises of Curtis Brothers, Inc., for the purpose of becoming the exclusive representative of such employees.

6. Respondent admits the allegations contained in paragraph VI of the complaint.

7. Respondent denies the allegations contained in paragraph VII of the complaint.

8. Respondent denies the allegations contained in paragraph VIII of the complaint.

9. Respondent denies the allegations contained in paragraph IX of the complaint.

10. Respondent denies the allegations contained in paragraph X of the complaint.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

L. A. TRAINHAM

DISTRICT OF COLUMBIA, SS:

L. A. TRAINHAM, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed, and knows the contents thereof; that the matters and things therein set forth of his own knowledge are true and those stated upon information and belief, he believes to be true.

L. A. TRAINHAM

Subscribed and sworn to before me this 11th day of June, 1956.

DORIS C. LOWE
Notary Public, D. C.

CERTIFICATE OF SERVICE

I hereby certify that copy of this answer was this 11th day of June, 1956, sent by mail, postage prepaid, to Harry E. Taylor, Jr., Esq., 600 F. St. N.W., Washington 4, D. C., attorney for Curtis Brothers, Inc.

/s/ THOMAS X. DUNN

THOMAS X. DUNN
831 Tower Building
Washington 5, D. C.

EXHIBIT 2

FORM NLRB-4279 (4-55)
FORMERLY NLRB-765, 765a and 765b

RC-RM-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

CURTIS BROTHERS, INCORPORATD

and

DRIVERS, CHAUFFEURS AND HELPERS, LOCAL UNION 639, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

COPY

Type of Election

☐ Consent Agreement
☒ Board Ordered
☐ Stipulation

Case No. 5-RC-1325

CERTIFICATION OF REPRESENTATIVES

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballot that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that Drivers, Chauffeurs and Helpers, Local Union 639, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, A.F.L. has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Baltimore, Maryland

On the 30th day of September, 1953.

On behalf of

NATIONAL LABOR RELATIONS BOARD
/s/ EUGENE A. CURRY

Acting Regional Director for
Fifth Region
National Labor Relations Board

GPO 891507

EXHIBIT 3

Adams 4-1050
4-1051
4-1052
4-1053
4-1054

DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION No. 639
I. B. OF T., C., W. & H. OF A.
1500 THIRTEENTH STREET N.W. ZONE 5

Affiliations
American Federation of Labor
Washington Building Trades Council
Teamsters Joint Council No. 55
Maryland State and District of Columbia
Federation of Labor
Washington Central Labor Union
Virginia State Federation of Labor

Washington 5, D. C.

February 16, 1955

Mr. John A. Penello
Regional Director
National Labor Relations Board
37 Commerce Street
Baltimore 2, Maryland

Dear Mr. Penello: In re: Curtis Bros., Inc., Case No. 5-RM-281

This is to advise that Drivers, Chauffeurs & Helpers Local Union 639 herewith abandons all claims to exclusive recognition as the majority bargaining representative for all drivers, helpers, warehousemen and furniture finishers employed by Curtis Bros. Inc., located at 2041 Nichols Avenue, Southeast, Washington, D. C., nor do we claim the right of majority representation of the above employees of Curtis Bros. Inc.

Local Union 639 files this express disclaimer of the right to be the exclusive bargaining representative for the employees in the above unit of the above employer. We further wish to state that this disclaimer is made in good faith, and we hope is clear and unequivocal.

Very truly yours,

L. A. TRAINHAM
L. A. Trainham, Recording-Secretary
Drivers, Chauffeurs, & Helpers
Local Union 639

LAT:ep

This is to certify that this is a photostat of original exhibit No. 2 which has been received in evidence in the proceedings before the National Labor Relations Board, Docket No. 5-RM-281,

ACME REPORTING COMPANY
ROY L. SMITH

UNION DRIVERS ARE SAFE DRIVERS—SAFETY FIRST—DEMAND UNION BOOK AT ALL TIMES

EXHIBIT 4A

CURTIS BROS.

Employs Nonunion

DRIVERS, HELPERS, WAREHOUSEMEN and Etc.

UNFAIR TO

Teamsters Union No. 639

AFL

EXHIBIT 4B

Teamsters Union No. 639
AFL

Wants Employes of

CURTIS BROS.

To Join Them to Gain

Union Wages, Hours, *and* Working Conditions

EXHIBIT 5

D-9203

114 NRLB No. 27 Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CURTIS BROTHERS, INC.
Employer-Petitioner

and

DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, A.F.L.
Union

Case No. 5-RM-281
Sept. 23, 1955

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before William C. Humphrey, Sr., hearing officer.[1] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer contends, and the Petitioner denies, that the Employer is engaged in commerce within the meaning of the Act according to the Board's present jurisdictional standards.[2]

The Employer is a Delaware corporation with its place of business in the District of Columbia. It is engaged in the cleaning of rugs, and in the sale, moving, and storage of furniture.

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[1] The name of the Employer appears herein as amended at the hearing.

[2] On August 27, 1953, the Board issued its Decision and Direction of Election in *Curtis Brothers, Incorporated*, Case No. 5-RC-1325 unpublished), asserting jurisdiction over the Employer.

Because the Board has plenary jurisdiction over enterprises located in the District of Columbia, we find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction over the Employer's operations.[3]

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Union seeks dismissal of the petition on the ground that no question affecting commerce exists concerning the representation of employees of the Employer.

On September 30, 1953, following an election directed by the Board in *Curtis Brothers, Incorporated, supra,* the Regional Director certified the Petitioner as the exclusive collective bargaining representative of the Employer's drivers, helpers, warehousemen, and furniture finishers, excluding salesmen, office clerical employees, guards, and supervisors as defined in the Act. Thereafter, the parties attempted to agree on the terms of a contract covering the employees in the appropriate unit but failed to do so, in particular with respect to a union shop provision. About February 24 or 25, 1954, the Union authorized a strike and picketing began at the Employer's plant. The pickets carried signs stating: "Curtis Brothers, Inc., On Strike, Drivers, Chauffeurs and Helpers Local 639, AFL." On February 1, 1955, the Employer filed the instant petition, covering the same unit as that described above. On or about February 16, the Union's Recording Secretary wrote a letter to the Board's Regional Director, stating in substance that the Union was abandoning all claims to recognition as the majority bargaining representative of the employees in the unit and expressly disclaiming the right to be such representative. The letter further stated that "this disclaimer is made in good faith, and we hope is clear and unequivocal." On February 17, picketing was discontinued,

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[3] *M. S. Ginn & Company,* 114 NLRB No. 25.

but it was resumed on the following day. The pickets now carried signs stating: "Curtis Brothers, Inc. Employs Non-Union Drivers, Helpers, Warehousemen, Et Cetera," "Unfair to Teamsters Local Union 639, AFL," and "Local Union 639, Teamsters (AFL) wants employees of Curtis Brothers, Inc., to join them to gain union wages, hours and working conditions."

In support of its contention that no question concerning representation exists, the Union in effect points to its disclaimer of interest in representation, and asserts that it is presently engaged only in an attempt to organize the employees concerned herein and thus regain its former status as their majority representative. The Employer asserts that the Union's current picketing activities are inconsistent with, and thus vitiate, the efficacy of its disclaimer of interest.

A disclaimer of interest in representation must be clear and unequivocal. When a union engages in conduct inconsistent with its express disclaimer, the Board holds such disclaimer to be equivocal and therefore ineffective to remove the question concerning representation in an employer petition.[4]

We believe that the Union's current picketing activities cannot be reconciled with its disclaimer of interest in representing the employees in question. In the light of all the material facts of this case, including the certification of the Petitioner, the circumstances preceding the strike, the nature of the first signs carried by the pickets, the brief discontinuance of picketing, and its early resumption, we are convinced that the current picketing is not for the sole purpose of getting employees to join the Union, as the more recent picket signs indicate, but is tantamount to a present demand that the Employer enter into a contract with the Union without regard to the question of its ma-

[4] See, e.g., *McAllister Transfer, Inc.*, 105 NLRB 751, and *Kimmel Shoe Company*, 97 NLRB 127.

jority status among the employees concerned.[5] Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All drivers, helpers, warehousemen, and furniture finishers working at and out of the Employer's plant at Washington, D. C., excluding salesmen, office clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 102.61 and 102.62 of National Labor Relations Board Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the

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[5] Cf. *Swee-T-Shirts, Inc.*, 111 NLRB No. 59; *Francis Plating Co.*, 109 NLRB 35; and *Petrie's, An Operating Division of Red Robin Stores, Inc.*, 108 NLRB 1318. Although *Member Peterson* dissented in the last case, he deems himself bound by the decision of the majority therein.

Contrary to the Union, we do not regard as controlling herein the *Hubach and Parkinson Motors* case, 88 NLRB 1202, where the Board gave effect to a union disclaimer and found no question concerning representation to exist. There, unlike the instant case, substantially all the strikers had been replaced during the strike and before the Union's disclaimer.

military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Drivers, Chauffeurs and Helpers Local 639, A.F.L.

Dated, Washington, D. C., September 20, 1955.

PHILIP RAY RODGERS, *Acting Chairman*
ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
BOYD LEEDOM, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

EXHIBIT 6

NLRB-760
(3-53)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

CURTIS BROTHERS, INC.
(Employer and Petitioner)

and

DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, A.F.L.
(Union)

COPY
Case No. 5-RM-281
Date issued
September 30, 1955
Type of election
(Check one):
☐ Consent
☐ Stipulated
☒ Board ordered

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters..... 31
2. Void ballots 0
3. Votes cast for Drivers, Chauffeurs and Helpers Local 639, A.F.L. 1
6. Votes cast against participating labor organization(s) 28
7. Valid votes counted (sum of 3, 4, 5, and 6) 29
8. Challenged ballots 0
9. Valid votes counted plus challenged ballots (sum of 7 and 8) 29
10. Challenges are (not) sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots has *(not)* been cast for: Drivers, Chauffeurs, and Helpers Local 639, A.F.L.

For the Regional Director—Fifth Region

/s/ W. C. HUMPHREY

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For CURTIS BROTHERS, INC.	For DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, A.F.L.
/s/ ARVINE K. ARMSTRONG	None
.....	.....
.....	.....
.....	.....
For	For
.....	.....
.....	.....
.....	.....

U. S. Government Printing Office 16—38308-5

EXHIBIT 7

Form NLRB-4280 (4-55) Formerly NLRB-767, 767a and 767b

RC-RM-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of
CURTIS BROTHERS, INC.
(Employer and Petitioner)
and
DRIVERS, CHAUFFEURS AND HELPERS LOCAL 639, A.F.L.
(Union)

COPY

Type of Election
☐ Consent Agreement
☒ Board Ordered
☐ Stipulation

Case No. 5-RM-281

CERTIFICATE OF RESULTS OF ELECTION

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that no collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9 (a) of the National Labor Relations Act.

Signed at Baltimore, Maryland
On the 13th day of October, 1955.

On behalf of

NATIONAL LABOR RELATIONS BOARD

/s/ JOHN A. PENELLO
Regional Director for Fifth Region
National Labor Relations Board

GPO 891508

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

Before the National Labor Relations Board

Fifth Region

In the Matter of: Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Curtis Brothers, Inc.	Case No. 5-CB-190 (Post 5-CC-59)

Conference Room C
Departmental Auditorium
Washington, D. C.
June 25, 1956

Pursuant to notice, the above-entitled matter came on for hearing at 11:20 o'clock a.m.

BEFORE:

SIDNEY LINDNER, Esq., Trial Examiner.

APPEARANCES:

THOMAS X. DUNN, Esq., 831 Tower Building, 14th and K Streets, Northwest, Washington, D. C., appearing on behalf of Drivers, Chauffeurs and Helpers Local 639.

HARRY E. TAYLOR, JR., Esq., 600 F Street, Northwest, Washington, D. C., appearing on behalf of the company, Curtis Brothers, Inc.

THOMAS W. KENNEDY, Esq., 104 W. Baltimore Street, Baltimore, Maryland, appearing on behalf of the General Counsel.

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CHARLES HENDRICKS

a witness called by and on behalf of the General Counsel, being duly sworn, was examined and testified as follows:

* * * * * * * *

Direct Examination.

Q. (By Mr. Kennedy) Where are you employed, Mr. Hendricks? A. Curtis Brothers, Inc.

Q. In what capacity? A. Credit and Office Manager.

Q. Can you tell us about the company you work for, Curtis Brothers; that is, is it a corporation? A. Yes, it is a corporation.

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Q. Do you know what state it is incorporated in? A. The State of Delaware.

Q. Where is its main office and place of business? A. 2541 Nichols Avenue, Southeast, Washington, D. C.

Q. What business is the company engaged in? A. The company is engaged in the business of moving, storage, rug cleaning, and retail furniture operation.

Q. Now, have you had an opportunity, Mr. Hendrick, to compile figures from your records concerning purchases and sales? A. I have.

Q. And what period do those figures cover? A. The period covers the last 12 months, or from June of 1955 through May of 1956.

Q. Can you tell us, then, with reference to purchases the total amount of purchases in the last twelve months in dollar value? A. The total purchases in the last twelve months are nine hundred and fourteen thousand and sixty-eight dollars.

Q. And can you tell us from your figures the dollar value of purchases that were purchased and shipped from outside the District of Columbia to the company's place of business in the District of Columbia? A. The amount of purchases coming from outside the District is $826,530.

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Q. Now, concerning your sales, tell us the total value, dollar value, of sales in that same period of time. A. The total sales in that same period of time would be $1,480,098.

Q. Can you tell us the dollar value of sales that involved sales of material sold and then shipped directly from the District of Columbia to points outside the District of Columbia? A. Purchases shipped outside the District of Columbia would be $718,089.

Q. And where they shipped from the company's store in the District of Columbia? A. That is correct.

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ARCHIE CURTIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

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Direct Examination.

Q. (By Mr. Kennedy) Where are you employed, Mr. Curtis? A. Curtis Brothers, Incorporated.

Q. And do you hold any official office or official capacity with the company? A. Superintendent, receiving, shipping and maintenance.

Q. Are you on the Board of Directors? A. Yes, I am on the Board of Directors.

Q. How long have you been in charge of—did you say

warehouse deliveries and maintenance? A. No, new furniture deliveries and maintenance.

Q. For how long a period have you done that? A. Twelve years.

Q. Who were the others in the company who are in official capacities? A. Following me is brother Harry, and—

Q. Is that Harry L. Curtis? A. Brother Arthur B, and brother George T.

My father is President of the company being George T. Curtis, Sr.

Q. Was there at one time another brother? A. Yes. It was Brother Fred that died the 9th of March of this year. He was the youngest brother of the five.

Q. Now, calling your attention to 1953, do you recall that

there was a petition filed by Local 639—that is, the Teamsters Union in this case—concerning certain employees in your company? A. Yes, sir, there was.

Mr. Kennedy: I would like to ask if it could be stipulated that such petition was filed on July 15, 1953?

Mr. Dunn: I will stipulate that a petition was filed on the date that you mentioned.

I object to it on the ground of materiality.

Trial Examiner: What was the date?

Mr. Kennedy: July 15, 1953 in case 5-RC-1325. I assume you include the number in that stipulation?

Mr. Dunn: Sure.

Trial Examiner: Is this in the nature of background evidence?

Mr. Kennedy: Yes.

Trial Examiner: The objection is overruled.

Q. (By Mr. Kennedy) Were you at the company during that time; that is, around and before July of 1953? A. I was.

Q. Was there any picketing of any nature at all during that time? A. There was none.

Q. Now, do you know that there was a hearing held in that case and a decision issued by the Board ordering an election? A. There was.

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Mr. Kennedy: May it be stipulated, Mr. Dunn, that that decision issued on August 27, 1953 ordering an election?

Mr. Dunn: I so stipulate. But I object to the admission of it on the ground of materiality.

Trial Examiner: The objection is overruled. And I will take official notice of the Board's file in case Number 5-RC-1325.

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Q. (By Mr. Kennedy) Do you know, Mr. Curtis, that an election was conducted at that time? I am talking now of September of 1953? A. There was.

Q. And do you know whether the union won that election or not? A. The union did, yes.

Q. And after that, did you receive a certification from the Board certifying that the union had won? A. We did.

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Q. (By Mr. Kennedy) Now, following the issuance of that certification, Mr. Curtis, did you and the union—and when I say the union, I mean the Teamsters Local 639—engage in bargaining sessions? A. We did, yes.

Q. Without going into any of the details of those bargaining sessions, can you tell us roughly about how many there were and what resulted? A. I think there were three sessions that we had with the union.

Mr. Dunn: Mr. Examiner, so I won't continually interrupt, may I have a running objection?

Trial Examiner: Yes, you have a standing objection to this entire line of questioning, Mr. Dunn.

* * * * * * * *

Trial Examiner: There were three bargaining sessions?

The Witness: Three bargaining sessions, yes, sir.

And that was, I think, in the latter quarter of 1953. That would be in 1953, yes, sir. And I think that we just about generally agreed on everything but a—

Trial Examiner: Well, he didn't ask you that.

Mr. Kennedy: I asked him for the results.

The Witness: We agreed on everything but the open shop.

Q. (By Mr. Kennedy) Do you recall roughly when the

last bargaining session was? A. No, sir, I do not. But it was in the last part of 1953.

Q. The last part of 1953? A. Yes, sir. If my memory serves me correctly.

Q. Following that last bargaining session, was there a strike at your place? A. Yes, sir.

Q. Do you recall when that was? A. That was on the morning of February 26, 1954.

Q. Did you have any contact with the company from your last bargaining session in the end of 1953 to the strike on February 26th? A. No, sir, not to my knowledge.

Q. Did you know it was going to happen? A. I did not, no, sir.

Q. Can you tell us how many of your employees went on strike? A. Nine.

Q. How many did you have in the unit that was involved in the certification of the Teamsters? A. I think it was twenty-one. I am not just positive.

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Q. Now, the picketing—was there picketing at the time the nine men went on strike? A. Yes, sir.

Q. Who did the picketing? A. Well, our nine employees plus a few others that they brought over there, including Mr. Trainham, Mr. Bell, Mr. Fuller, Sr. and Jr.

Q. Just one moment. You mentioned names. First you say nine employees went out. You said some others. What you you mean by others? A. I imagine tlfey were union officials or men—

Q. Well, they were not your employees? A. No, sir, they were not our employees.

Q. You mentioned names of Mr. Trainham, Mr. Bell and two Mr. Fullers? A. That is correct.

Mr. Kennedy: May we have a stipulation—

Mr. Dunn: I stipulate Mr. Trainham is the Recording Secretary of Local 639; Mr. Bell is the President—rather, the Mr. Bell referred to is Secretary-Treasurer of Local 639, and Mr. Fuller Sr. is the organizer of the Teamsters Joint Council for the Districts of Columbia; Mr. Fuller, Jr. is a member of Local 639.

Mr. Kennedy: Is that District Council Number 55?

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Mr. Dunn: Yes, sir.

Q. (By Mr. Kennedy) Mr. Curtis, was there ever any picketing at your place at any time prior to that day of February 26th, 1954? A. No, sir.

* * * * * * * * * *

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Q. (By Mr. Kennedy) Can you tell us generally or to the extent that you know—describe the picketing; how many would be there at any given time? And where would they patrol? A. At the outset of the picketing, there were from fifteen to twenty every day.

Q. I am talking about at one time? A. Yes, at one time. And they would picket the store and front of the warehouse.

Q. All right. Now, generally, how long did that picketing continue? We are now talking about February 26th? Did it continue through March? A. Yes, it did.

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Q. Through April? A. It did.

Q. Did it continue for a full year? A. It did.

Q. Calling your attention to almost a year later, around February of 1955, was picketing still going on? A. It was.

Q. At that time how many pickets would there normally be at any given time? A. It averaged six.

Q. Where did they patrol? A. They patroled the front of the warehouse and the front of the store.

Q. Do you recall—well, first, did they carry signs or placards? A. They did.

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Q. Can you tell us from your own knowledge what the reading was? A. "Curtis Brothers on Strike. Unfair to Organized Labor. Drivers, Helpers, and Warehousemen."

Mr. Dunn: Has he finished with his answer?

Trial Examiner: Yes.

Q. (By Mr. Kennedy) Now, from February 26, 1954, when the picketing began, through the following February, 1955, did your company, Curtis Brothers, Inc. replace those employees who went on strike? A. We did.

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Q. Do you know that on February 1, 1955, that your company filed a petition with the Board asking for another election? A. We did.

Mr. Kennedy: Mr. Dunn, may it be stipulated that on February 1, 1955 that Curtis Brothers, Incorporated filed a petition with the Board, Docket 5-RM-281?

Mr. Dunn: It is so stipulated. And the same objection.

Trial Examiner: All right.

The stipulation is accepted, and the objection is overruled.

Q. (By Mr. Kennedy) Was there a hearing in that case, Mr. Curtis? A. Yes.

Mr. Dunn: The record will show that. I don't think the witness has to testify to that.

Trial Examiner: The record will show.

Again I will take official notice of the Board's file.

Q. (By Mr. Kennedy) After your company filed a petition, but before the hearing, did you have occasion to know of a letter that was written by Mr. Trainham of the Teamsters Union to the Labor Board in which they said that they did not represent the employees? A. I do, sir.

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Q. (By Mr. Kennedy) Mr. Curtis, you testified that the

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picketing continued from February 26, 1954 throughout the period we have discussed, which has been almost a year. Now, calling your attention to February 16, do you recall whether there was picketing on that day or not?

Trial Examiner: What year?

Mr. Kennedy: 1955.

The Witness: February 16?

Yes, there was picketing.

Q. (By Mr. Kennedy) How about the 17th? A. No sir, there was no picketing the 17th.

Q. That is the 17th of February, 1955? A. 1955, yes, sir.

Q. How about February 18, 1955? A. Yes, sir, there was.

Q. Now, will you tell us what difference, if any, there was between the picketing of February 18, 1955 and the picketing of February 16, 1955? A. They had changed the reading on the sign that they had used in the front of them.

Q. Well, now, did you have occasion to have pictures made of the new signs that appeared on Februa.y 18th? A. Yes, sir.

Mr. Kennedy: I will ask the court reporter to mark these two photostats as General Counsel's Exhibit Number 4-A, the one which has the words "Curtis Brothers" on top; and

as 4-B, the one which has the words "Curtis Brothers" in the middle.

(The documents above referred to were marked for identification as General Counsel's Exhibits No. 4-A and 4-B.)

Q. (By Mr. Kennedy) Mr. Curtis, I hand you what has been marked for identification as General Counsel's Exhibits Number 4-A and 4-B. Will you tell us what they represent? A. After February 18, or on February 18, the pickets had this on the front of them.

Mr. Kennedy: Let the record show he is holding up General Counsel's Exhibit 4-B for identification.

Trial Examiner: 4-B was in front, yes.

The Witness: And this one he had on his back.

Trial Examiner: 4-A was carried on the picket's back?

The Witness: Yes, sir.

Mr. Kennedy: I offer in evidence General Counsel's Exhibit 4-A and 4-B.

Mr. Dunn: No objection.

Trial Examiner: General Counsel's Exhibits 4-A and 4-B are received in evidence.

(The documents heretofore marked General Counsel's Exhibits No. 4-A and 4-B were received in evidence.)

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Mr. Kennedy: I will ask the court reporter to mark this two-page document as General Counsel's Exhibit Number 5 for identification.

(The Document above referred to was marked for identification as General Counsel's Exhibit Number 5.)

Mr. Kennedy: It is a document entitled "Decision and Direction of Election" dated September 20, 1955.

Q. (By Mr. Kennedy) Mr. Curtis, I hand you what has been marked for identification as General Counsel's Exhibit Number 5. I ask you if that is the Board decision referred to? A. Yes, sir. I have seen this.

Mr. Kennedy: I offer in evidence General Counsel's Exhibit Number 5.

Mr. Dunn: Now, this particular exhibit, Mr. Examiner—not making an inquiry, but for what purpose is GC-5 being introduced?

Trial Examiner: Would you care to state the purpose, please, Mr. Kennedy?

Mr. Kennedy: For the same purpose, Mr. Examiner, that these other exhibits have been put in here. This is a Board decision, which can be—

Trial Examiner: Well, the other exhibits have been put in here for the purpose of background, as I understood you; is that correct?

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Mr. Kennedy: That is correct.

Trial Examiner: We are here talking about September, 1955, which, of course, is six months prior to the filing of the charge. So the same would apply as much to this docu-

ment, General Counsel's Exhibit 5 for identification, as to the other documents. They are background evidence leading up to the period in question here when the unfair labor practices allegedly took place.

Mr. Kennedy: That is right. We have a running chronology of everything occurring including the Board's decision.

Mr. Dunn: It goes a little bit deeper as far as my objection in this matter is concerned, because I don't know what position I am being placed in. Frankly, I am a little confused about the General Counsel's case. But is this being introduced for the purpose of you, either (1) taking judicial notice of the decision, to which I have no objection—and you have already said that you would—or (2) is it being introduced for the purpose of you taking as evidence in this case statements made by the Board, which I consider self-serving statements made in another case by another tribunal, having no relation to any evidence in this case, because the witness has testified to nothing of the kind with respect to this, and apparently cannot, but if it is for the purpose of

your giving weight to testimony, whether it is previous to the limitations in Section 10 or whether it is subsequent to that, it makes no difference as far as how you accept this as testimony.

If you are going to make some finding, whether on the basis of background or not, previous to the limitation bar date that such and such a thing happened, I object to it. And I don't see how you can accept the statement of a court or tribunal or an agency that the facts are these, and for you simply to take them as facts.

If you make any findings in this case, you either make them based on the testimony of witnesses under oath. I have no right to cross-examine, and I can't possibly cross-examine with that type of evidence.

. . . . . .

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Trial Examiner: I am concerning solely the 10(b) problem.

Now, so far as what the Board has set forth here, I have no doubt that the Board did receive evidence in a hearing upon which they made a certain finding. That finding is set forth in this Board decision of direction of election.

Now, I will receive this document. Your objection is noted. And I will receive it for the purposes I set forth for the chronology of the events that took place and the background of what took place at Curtis Brothers.

(The document heretofore marked for identification as General Counsel Exh. No. 5 was received in evidence.)

Mr. Dunn: I just have one further question, Mr. Examiner.

Trial Examiner: Yes.

Mr. Dunn: When you say you are receiving it to show the chronology of events, are you taking the events, the facts that are stated in that Board decision, as evidence in this case?

That is the only purpose of it.

Trial Examiner: Not as evidence upon which an unfair labor practice finding can be made; no.

Mr. Dunn: Then I haven't put my question properly.

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Are you taking the facts as set forth in that decision as any type of evidence in this case, upon which a finding can be made or not?

Trial Examiner: As background evidence, yes.

Mr. Dunn: The factual matters that are set forth in there for the purpose of background evidence are being received?

Trial Examiner: Yes, sir.

Mr. Dunn: All right.

I renew my objection, if I haven't made one.

Trial Examiner: Yes. Your objection is noted, and it is overruled.

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Q. (By Mr. Kennedy) Mr. Curtis, following that decision which is now in evidence as General Counsel's Exhibit 5, was there an election held in your company covering the employees that were involved in the first election? A. Yes, sir.

Q. And at the end of that election were you given a tally of ballots showing the results?

Mr. Kennedy: I ask the court reporter to mark this document entitled "Tally of ballots" as General Counsel's Exhibit Number 6 for identification.

(The document above referred to was marked for identification as General Counsel's Exhibit No. 6.)

Q. (By Mr. Kennedy) Mr. Curtis, I show you what has been marked for identification as General Counsel Exhibit Number 6. Is that the tally of ballots, a copy of the one that was given to you at the close of the hearing? A. That is right: 28 to 1.

Mr. Kennedy: I offer in evidence General Counsel's Exhibit Number 6.

Mr. Dunn: No objection.

Trial Examiner: General Counsel's Exhibit Number 6 is received.

(The document above referred to was received in evidence as General Counsel's Exhibit No. 6.)

Q. (By Mr. Kennedy) Following that election, Mr. Cur-

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tis, did you receive a certificate of results of the election? A. Yes, sir.

Mr. Kennedy: I will ask the court reporter to mark for identification as General Counsel's Exhibit Number 7 a

document entitled "Certificate of Results of Election."

(The document above referred to was marked for identification as General Counsel's Exhibit Number 7.)

Mr. Kennedy: I offer in evidence General Counsel's Exhibit Number 7.

Trial Examiner: General Counsel's Exhibit Number 7 is received in evidence.

(The document above referred to was received in evidence as General Counsel's Exhibit No. 7.)

Q. (By Mr. Kennedy) Mr. Curtis, calling your attention now to the times when the new sign was worn by the pickets, General Counsel's Exhibits 4-A and 4-B, confining yourself to that time, did you have occasion to observe the pickets? A. I did.

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Q. (By Mr. Kennedy) Will you describe the activity of

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the pickets, Mr. Curtis, where they walked, what they did, whom they spoke to, if anybody? A. At that—at what time, sir?

Q. I am now talking about—if you can recall specific occasions, then, let us know. But after the new sign was worn; which is after February 18, 1955. A. From February 18 until November of the same year, where the pickets were, was about the same as they had always walked; in front of the warehouse and in front of the store.

After the middle of November, they talked mostly in front of the store.

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Trial Examiner: I take it from that that there was more than one picket; is that correct?

The Witness: More than one, yes, sir.

Trial Examiner: Can you tell us how many there were?

The Witness: Up until November, it was three.

Trial Examiner: Yes, sir.

The Witness: After that, it has been two.

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Q. (By Mr. Kennedy) I believe you stated that in November of 1955 that the plan or rather the manner of picketing changed. Will you describe what they were doing then, say, from November of 1955? A. From then to date?

Q. Yes. A. They are picketing the front of the store on Nichols Avenue.

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Q. When you say "They" in what numbers at any given time? A. Two.

Q. Do you mean there were formally two? A. Normally two, yes, sir.

Q. Now, have you observed—

Trial Examiner: Let me ask a question with respect to that: as I understand your testimony, sir, you answered Mr. Kennedy's question first, and you said two. Then, you answered another question, and you said normally two. Am I to understand that from November 1955, to the present date that there were never more than two so far as you observed?

The Witness: That is very hard to answer. Because there are two men—there are over that—I don't think they are there today—but as a rule there are two. They relieve one another. Sometimes both of them walk together, and sometimes it is just one; the other goes off somewhere.

Trial Examiner: I see. And, from the period November 1955 to the present date, from your observations, have you observed more than those two you have described?

The Witness: No, sir, I have not.

Trial Examiner: So two is the maximum number at any one time?

The Witness: Yes, sir. They have changed. But it has been about two.

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Q. (By Mr. Kennedy) Mr. Curtis, you have described to us that since November of 1955 the pickets have walked or patrolled on the front of the store. That store fronts on what street? A. Nichols Avenue.

Q. Now, is there any entrance to the store across the front of the stofe? A. No.

Q. What is across the front of the store? A. Three display windows.

Q. Where is the customer's entrance with relation to the front of the store? A. Just to the south side of it.

Q. Does the customer's entrance of the store face any street? A. It faces V street. But a large parking lot is between the entrance and V Street.

Q. Where is your employee's entrance? A. They enter the warehouse, which is on V Street and Shannon Place, southeast.

Q. Have any of your employees—and when I say employees, I want to restrict it to the employees who were involved in the elections that you have had there, namely,

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the warehouse men, the drivers,—do any of them report or leave from work by the entrance that you described as the customer's entrance? A. No, sir.

Q. Do they all enter and leave by the same entrance? A. By the same V Street door, yes, sir.

Q. Now, how far away is that V Street door from the front of the store, having the three display windows, where

you described the pickets patrol? A. As the bird flies or by Street?

Q. Give it as by street. How far is it from the corner of your building, the north corner, to the corner of V and Nichols Street? A. A long city block.

Q. How far is it, then, going westward, from the corner of V and Nichols Street to the area where you have the employees entrance? A. Pretty near a city block.

Q. Could you, standing at the door of the employees' entrance, see the front of the store having the three display windows? A. I couldn't see the front of it, no, sir, not from the employees' entrance.

Q. Could you see anybody walking? A. Yes.

Q. From the employees' entrance? A. By looking

through the parking lot, yes.

Q. If there were automobiles there would it make a difference? A. No. I couldn't see them unless I walked to the corner of the building, you see, and looked directly across the parking lot, providing there was no cars.

Q. Now, have you observed the pickets talking with anybody? A. No, sir.

Q. Have you observed them contacting anybody in any manner? A. No, sir.

Q. Have you had an opportunity to observe what they have done or do when trucks come in for deliveries? A. From when? Just from November?

Q. Well, tell us what you have observed. And then—first, have you observed them having any activity in connection with deliveries of trucks? A. Not of late, no, sir.

Q. Well, when? A. Well, up until November.

Q. When the most recent? A. The middle of November, the 15th of November, before Christmas.

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Now, in answering Mr. Kennedy's question, up until November of the 15th, you state that you observed some of these pickets stop a truck, is that correct?

The Witness: Yes, sir.

Trial Examiner: More than one truck?

The Witness: More than one truck yes, sir.

Trial Examiner: Did you hear the conversation that ensued between the picket and the truck driver?

The Witness: No, sir, I didn't.

Trial Examiner: All you saw was the truck stop?

The Witness: Yes, sir.

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Q. (By Mr. Kennedy) Have you had any occasion to—

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strike that. What have you observed—what have you seen, with relation to stopping of trucks? A. They would take their sign off the back and go out and either get in the truck or stand on the running board of the truck.

Q. Have you heard any conversation between them and the truck drivers? A. I have.

Q. When? A. Up to and prior to November.

Q. When is the most recent? A. In November.

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Trial Examiner: Well, we will get that, Mr. Dunn.

Give us the date, so far as you can remember, that the

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incident took place; what you observed; who spoke to whom; and what you heard, if anything?

The Witness: Well, I couldn't give you those dates, and I couldn't tell you what the trucking company was; because there were too many occasions; way too many occasions to point out anything—any single one.

Trial Examiner: By way too many occasions what do you mean, sir?

The Witness: Because it was practically all of the trucks that were coming in our place at that time that were stopped by the pickets.

Trial Examiner: By the way, where were the trucks coming from, sir?

The Witness: From the street.

Trial Examiner: Where were they going into?

The Witness: Into our receiving entrance.

Trial Examiner: Is that the warehouse?

The Witness: Yes, sir.

Trial Examiner: And that is on V Street between Nichols Avenue and Shannon Place?

The Witness: Yes, sir.

Trial Examiner: And there is an entrance into the warehouse?

The Witness: Into the warehouse, yes, sir.

Trial Examiner: And you observed trucks not going into

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the warehouse?

The Witness: That is right.

Trial Examiner: With pickets on the truck?

The Witness: Pickets standing on the running board of the truck.

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Q. (By Mr. Kennedy) Can you recall any specific occasion? A. Roadway. I couldn't give you the date.

Q. Can you give us an approximate date? A. Well, it would only be a guess. And that would be in November.

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Trial Examiner: Is that your best memory, of November 1955?

The Witness: Yes. That is when that came to a stop in November. I remember that very well. But as far as any specific date, I don't remember.

Q. (By Mr. Kennedy) Well, what do you recall with reference to Roadway? What took place? A. Well, the picket was on one side of the truck and I was on the other and he was telling him not to go in and I was telling him to come in; that I had a disclaimer that was written. And if he would come into our bulletin board, I would show him this disclaimer that we had. And he said that he had orders not to go in there. And he didn't go in there.

Q. Did you show him the disclaimer? A. No. He wouldn't—not in that case. He wouldn't—

Trial Examiner: You didn't show it to him?

The Witness: No, sir, I did not.

Trial Examiner: All right.

Q. (By Mr. Kennedy) Have you observed the pickets doing anything else besides just walking up and down? A. Other than taking tally of customers that were going into the store, I have observed that, that they would write on the corner of the sign, that is one, two, three, four tally. I have noticed that on several occasions; like different days of the week they would do it, not all the time, but different days of the week they would—

Q. How recently have you observed that? A. Well, that has been last—since the alteration of our store.

Trial Examiner: Since what? I didn't hear that.

The Witness: Since completion of alterations, which was, I would say in April. March or April.

Trial Examiner: By tally, Mr. Curtis, do you mean that they marked something down as you testified on that picket sign?

The Witness: Yes, sir. If they see a customer going into the store they would just scratch a mark down on the sign.

Trial Examiner: Did you stand there and observe that?

The Witness: Yes, sir, I have watched that on numerous occasions.

Trial Examiner: All right.

Q. (By Mr. Kennedy) Have you noticed them keeping any tally with reference to trucks? A. Yes, sir, they would write down the number of the truck as it would come in.

Q. How recently have you observed that? A. Well that would be in November too. That is when they went from around the warehouse and walked exclusively in the front of the building.

Trial Examiner: I don't want to interrupt too much. But just tell us once again what you observed with respect to the trucks; what you observed the pickets doing with respect to the trucks, since November of 1955? Do you understand the question?

The Witness: Yes, sir.

Trial Examiner: What did you observe the pickets doing?

The Witness: Since?

Trial Examiner: Yes.

The Witness: Well, they haven't molested the trucks since that.

Trial Examiner: Have you observed them making any tally of anything?

The Witness: No, sir, I haven't.

Trial Examiner: The only observation that you can testify—or that you have testified to is that you noticed that the pickets marking something down on their picket signs?

The Witness: Yes, sir.

Trial Examiner: Since November?

The Witness: Since November, yes.

Trial Examiner: But nothing with respect to trucks?

The Witness: They did have books and was writing numbers of the trucks as they came in up until that time.

Trial Examiner: Up until November?
The Witness: Yes, sir.

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Trial Examiner: I see.

Q. (By Mr. Kennedy) When is the last time that you observed that tallying with respect to trucks? A. I think I have answered that question, haven't I? Wasn't that in November?

Q. All right. Do you have a rough idea of when in November? A. It was the middle of November when they stopped walking in front of the warehouse and went around to the front.

Q. What you observed? A. Of what? Of the pickets?

Q. With relation to trucks. A. Well, on a few occasions, they wouldn't come in. They wouldn't say anything to the picket. But they did see the sign and would hesitate in coming in. And go off somewhere and call up and tell me just what the situation was. And I would try to explain to them what it was. And in some instances they would come in. I don't think there was many that hadn't.

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Q. Now, Mr. Curtis, with reference to the employees, involved in this case, namely, drivers, helpers, warehousemen, and furniture finishers, what time do they go to work? A. 8:00 o'clock.

Q. They have told us that they go in—you told us they went in on the V Street employees' entrance? A. Yes, sir.

Q. Do they punch a clock when they go in there? A. Yes, sir.

Q. Do they punch a clock when they come out? A. Yes, sir.

Q. What time are you generally down there in the morning? A. I am down there at 7:30.

Q. You have testified that the—you have testified about the pickets and where they walk. Have you had occasion to see when the pickets arrive for their picketing duty? A. Yes, sir.

Q. Can you tell us what time that is? A. I would say from 8:30—they will get there long about 8:30, 9:00, 9:30. They don't have any set time for starting.

Q. Have you ever seen them there before eight? A. No, sir. They haven't been there before eight since they have been walking out in front. It is pretty near 9:30 every morning before they start.

Q. Now, what time do your employees—and again I am referring to the drivers, warehousemen, helpers and furniture finishers—when do they leave work in the day? A. At 5:00 o'clock.

Q. Now, in your work do you have occasion to be there at 5:00 o'clock? A. Yes, sir.

Q. Do you have occasion to be there after five? A. Yes, sir.

Q. Do you have occasion to be there in the evening? A. Yes, sir. Often.

Q. Is it normal for you to be there in the evening? A. Yes, sir.

Q. Can you tell us from your observations what time the pickets who patrol the front of the store leave?

Trial Examiner: What period of time are you now questioning the witness about?

Mr. Kennedy: Well, I will confine it, say, to during the

last two months.

The Witness: They leave between eight and nine p.m.

Mr. Kennedy: During those hours from five to nine p.m. do you have any employees in or about your premises who

could be described as drivers, helpers, warehousemen and furniture finishers?

Do you have any of those people in or about your business from 5:00 p.m., to 9:00 p.m.?

The Witness: No, sir.

Q. (By Mr. Kennedy) What time does your store close? A. 9:00 o'clock Monday through Friday.

Q. What time does it open in the morning? A. 9:00 o'clock.

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Cross-Examination.

Q. (By Mr. Dunn) Are your drivers always finished as far as deliveries are concerned by 5:00 o'clock in the afternoon? A. The drivers as far as furniture deliveries, did you say?

Q. Are your drivers, as far as their deliveries are concerned, finished by 5:00 o'clock in the afternoon? A. As a rule, yes, sir.

Q. How about moving and storage? A. Occasionally there may be a truck that would be 6:00 o'clock before they get in. That is only occasionally.

Q. So it is the exception that all of your drivers have not

reported and punched out by 5:00 o'clock in the afternoon? A. As a rule they are punched out by 5:00 o'clock.

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Q. In respect to this Roadway incident, Mr. Curtis, is that Roadway Express Company? A. Yes, sir.

Q. What is the business that Roadway is engaged in? A. What was that again, sir?

Mr. Dunn: Read the question.

(Question read.)

The Witness: Express.

Q. (By Mr. Dunn) They are engaged in the express business? A. Yes, sir.

Q. And they move what? I assume they are movers when you say express? A. Well, freight.

Q. What type of freight? Furniture? A. All kinds of freight.

Q. Does that company do very much business with your company? A. Not a whole lot, no, sir.

Q. How often does Roadway Express come into your plant? A. Very seldom. I would say a dozen times a year

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would cover that on Roadway.

Q. How often in 1955, would you say, approximately? A. None.

Q. None at all? A. None at all.

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Q. (By Mr. Dunn) Didn't you testify that you were hanging on the running board of the Roadway Express truck in 1955? A. I did, that is right.

Q. Is it your testimony that it did not come in? A. I testified it did not come in.

Q. Where were you hanging onto the running board? A. In front of our warehouse on V Street.

Q. Was it a public highway? A. It was a public street.

Q. How did you get to get out there? A. Because I saw them out there stopping, and he was wondering just which way to go. And by that time, the picket had gotten up on the running board by the same time I did.

Q. You went out there because you felt he was wondering— A. I was going out there to find if he wanted it on this side—

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A. At that particular time when I saw him pull up, there wasn't anything happening.

Q. There was nobody there? A. No picketing.

Q. So you walked these fifty feet to tell him which way to go? A. Twenty-five feet, yes, sir.

Q. Pardon me. Twenty-five feet? A. Yes, sir.

Q. During that time, did anything else occur? A. Yes, sir.

Q. What was that? A. The picket came down the street from around the front.

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A. He had been out front, and he saw that truck there. At that time—

Q. You were out back 25 feet? A. I was at the warehouse, yes.

Q. He was out front, and he saw this truck? A. Yes, sir.

Q. Did he see through the building? A. No. All he had to do was—

Q. How do you know that the picket out front saw him? A. Because he saw him turn in.

Q. How do you know he saw him turn in? You were in the back, Mr. Curtis.

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Trial Examiner: You didn't see the picket in front of the store, did you, sir?

The Witness: No, sir, I did not. That is where he had been working that day.

Trial Examiner: The first time you observed that picket was coming down V Street from Nichols Avenue?

The Witness: Yes. He and I were about equal distance

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from him when I saw him. He went to one side of the truck and I went to the other.

Trial Examiner: Well, when you walked out of—I take it you were on the street in front of your warehouse when the truck was on the roadway; is that correct?

The Witness: Yes, sir.

Trial Examiner: When you walked out to the truck, were you able to see this picket in front of your store?

The Witness: No, sir, because he was coming down V Street when I saw him.

Trial Examiner: That is the first time you observed him?

The Witness: That is the first time I saw him, yes, sir. As a matter of fact, he was running with his sign in his hands. That is the first time I saw him. He ran out in the street on the left hand side of the truck, and I stepped on the running board of the right hand side of the truck. We were both talking to him at the same time.

Trial Examiner: All right, Mr. Dunn.

Q. (By Mr. Dunn) You testified about the—strike that. You testified to the best of your recollection that this incident occurred in November of 1955? A. Yes, sir.

Q. Could it have been October of 1955? A. It could have been, yes, sir.

Q. Could it have occurred in August of 1955? A. No, I don't think it was that far back.

Q. Could it have occurred in September? A. I wouldn't put my finger on any set date. But it was before Christmas of last year.

Q. When you say before Christmas, you say it could have been— A. Well, it was before the 15th of November.

Q. It was before the 15th of November? A. Before the 15th of November, yes.

Q. Then, it could have been October? A. It could have been October.

Q. And it could have been September? A. I doubt it very much. I doubt it very much.

Q. But it could have been? A. It could have been, yes sir.

Q. It could have been August, although you doubt tha very much too? A. No, it wouldn't say it was that fa back.

Q. You are absolutely sure it was not August? A. don't think so, no, sir..

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Q. You testified about the taking of a tally of customers

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As I understand your testimony, you said that they marke it down on their picket signs? A. Yes, sir..

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Q. I believe you said that they wrote down the numbe Did they take down the number of the licenses of automo biles? A. Yes, sir.

Q. Those were customers also? A. Customers also, yes sir.

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Q. Where did they put those? A. In a book.

Q. In a book? A. Yes, sir, they all had books.

Q. When did they start doing that? A. They starte that in 1954.

Q. When did they stop doing it? A. I don't know, sir when they started it. They were doing it up to Novembe But just when they stopped, I don't know.

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Q. It wasn't any later? A. No, sir.

Q. They stopped in November? A. They stopped in No vember, yes, sir.

Q. And they continued it up to November; and that i your best recollection? A. Yes, sir.

Q. Now, did you actually see them write these license numbers? A. Well, now, what they were writing I couldn't

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testify. But they had books. And they had pencils and what they were writing in them I don't know.

Q. They could have been writing a poem, could they not? A. They could have, yes, sir.

Q. You don't know what they were writing? A. In one instance I know what they were writing.

Q. In one instance? A. Yes.

Q. You saw them writing? A. I saw them writing.

Q. For over a year and a half? A. Yes.

Q. And you were assuming that they were writing down license numbers? A. I know they were writing numbers.

Q. You know they were writing them down, although you did not see them do it? A. I did see them do it in this case.

Q. In one instance A. One instance.

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Q. You are assuming all other times when they had a pencil in their hand, together with a book, that they were again writing license numbers? To your knowledge you have only seen them write down one license in a book; is that your testimony? A. That is it, yes, sir.

Q. When was that? A. Prior to November.

Q. Prior to November of 1955? A. Yes, sir.

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Q. Who was it that had the book and pencil and wrote down this license number? A. A colored man.

Q. Was he a picket?

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Q. Where were you when you saw him writing this down in the book? A. Standing right in one of the entrances of our building, sir.

Q. Where was he? A. He was on V Street at the entrance of the building.

Q. How far away was he from you? A. From me?

Q. Yes. A. I would say 75 feet.

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Q. Your testimony is that since the picketing started on February 24, 1954 that the pickets have reduced in number? A. Yes, sir.

Q. I think you testified there were twenty there? A. Yes, sir.

Q. Now there are no more than two? A. Yes, sir.

Q. Have you had any discussions with Mr. Trainham since October of 1955? A. Have I? No, sir.

Q. Have you any knowledge of whether your company has had any discussions with him? A. Yes, sir.

Q. Who might that be? A. I think my brother Harry has.

Q. Now, bringing you back to the background here of February of 1954 after Local 639 had been certified, you testified about that. You sat down and had collective bargaining conferences. How many did you have? How many conferences did you have with Local 639? A. Three, as well as I can remember.

Q. Three conferences? A. Yes, sir.

Q. And how long did these conferences take approximately each conference? A. Three hours; they averaged

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three hours. From 10:00 until about 1:00.

Q. Ten o'clock in the morning? A. Yes, sir.

Q. And the issue on which you had reached an impasse was a question of union shop? A. That is correct.

Q. You refused to agree on union shop? A. That is right.

Q. You refused to agree on an issue which would force your employees to become members of the union? A. That is right.

Q. You are opposed to union shop, therefore? A. Yes, sir.

Q. Were you aware at the time you were bargaining on this issue that the union shop is legal under federal law? A. Yes, sir.

Q. And that the employees were entitled to it? A. That is right, sir.

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Redirect Examination.

Q. (By Mr. Kennedy) Mr. Curtis, in answering Mr. Dunn's questions about your ability or inability to see something being written 75 feet away, you testified that you saw someone writing in a book from that distance; is that correct? A. Yes, sir.

Q. How did you learn that it actually was—that it actually contained written numbers of trucks?

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The Witness: In this particular case, he wrote it in the book and walked up to the corner of the fence and put his book on the fence post and walked off and left it and went and sat in an automobile.

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Q. What did you do? A. I went up and got the book

and looked to see what he was writing. And there is where he was writing the numbers of cars and trucks.

Q. So when you say you were able to read them, you read them from the book? A. Yes, sir. That is where I saw them.

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A. I saw him writing in the book and lay it down, yes, sir.

Q. Are you sure that what he wrote down in the book was the license number? A. No, sir, I wouldn't—I just have the book. That is all.

Q. You just have the book with the license number in it? A. Yes, sir. With a lot of numbers.

Q. But you are not sure what he wrote down in the book was a license number? A. No, sir, I would not.

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Q. You testified that you obtained this book in October of 1955. Do you want to change that testimony? A. It was—was in October? Leave the testimony rest at October.

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ARCHIE CURTIS

was called to the stand as a witness, and having been previously sworn, was examined and testified as follows:

Further Recross-Examination.

Q. (By Mr. Dunn) Do you recall yesterday that you gave testimony in respect to an incident that occurred in the rear of the premises as I recall it in respect to a Roadway Express making a delivery to your plant. Do you recall that testimony? A. Yes, sir.

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Q. Right. You testified you didn't know the name of that

driver? A. No, sir.

Q. For Roadway Express? A. That is right.

Q. Have you ever seen him before? A. No, sir.

Q. Now, this picket that came up to the truck, had you seen that picket before? A. Yes, sir, I had.

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Q. (By Mr. Dunn) Do you have bill of ladings in your office on shipments from Roadway Express for the latter part of the year 1955, from July, say, to the end of 1955? A. Not to my knowledge. Not to my knowledge from Roadway.

Q. Your testimony is that you don't have them there? A. That is my testimony, yes.

Q. Do you generally keep the bills of lading that you received from express companies? A. From all express companies, yes, sir.

Q. Why is it you don't have any from Roadway? A. I don't think we got any from Roadway. I don't know positively.

Q. Would you examine your files and look to determine whether you have any vouchers or bills of lading from Roadway? A. Would I, you say?

Q. From July 1955 to the end of 1955? A. I certainly would, sir.

Q. Thank you.

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Further Redirect Examination.

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Q. Let me ask you about last evening. Did you have occasion to visit your store last evening? A. Yes, sir.

Q. Can you tell us whether or not you observed the pickets there? A. Yes, sir, they were there at five o'clock.

Q. Tell us whether or not you observed what time they left there? A. They left at quarter past eight.

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GEORGE CURTIS

was called as a witness and having been duly sworn was examined and testified as follows:

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Direct Examination.

Q. (By Mr. Kennedy) Are you employed or connected with Curtis Brothers, Inc.? A. I am.

Q. In what capacity? A. Vice-President.

Q. And as Vice-President do you have any specific duties? A. Yes.

Q. What are you in charge of? A. Well, I just look after about everything in general. I have a general scope of the whole layout.

Q. Are you normally in or about the premises of Curtis Brothers, Inc., on V Street and Nichols Avenue every working day? A. I am.

Q. Are you both inside and outside? A. I am.

Q. Now calling your attention to the election that was held—and it has been stipulated that there was an election held on September 30, 1955—that would be the second one

—and the election where the employees voted against the union; do you recall that time? A. Yes.

Q. What I am interested in, Mr. Curtis is activity that took place following that. So, let's talk about, say, from the middle of October on.

Mr. Dunn: 1955?

Mr. Kennedy: The middle of October 1955 to the present time, yes.

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Q. (By Mr. Kennedy) Have you had occasion to note the existence of pickets in front of your store? A. I have.

Q. Now, during that period which I have mentioned, not earlier than October, the middle of October, but from that time on, what activity if any have you observed the pickets engaged in other than walking up and down in front of the store?

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The Witness: As I said before, on occasions trucks would stop in front of the store where the picketing was being carried on, and there would be conversations between the picket and the truck driver. In lots of cases, the trucks would proceed on.

Q. (By Mr. Kennedy) When you say proceed on, proceed on where? A. On up the street.

Q. What street? A. Up Nichols Avenue away from our premises.

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Trial Examiner: Obtain the dates that these things happened.

Q. (By Mr. Kennedy) You said you have observed such activity somewhere from the middle of October to the present time. On how many occasions have you observed such

activity as what you have just described? To the best of your memory? A. Six at least. At least six.

Q. Now, when is—

Mr. Dunn: Mr. Examiner, I had a running objection yesterday to this type of examination with the other witness. I would appreciate it if I could have it here.

Trial Examiner: All right.

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Q. (By Mr. Kennedy) When is the last or most recent time that you observed any such activity as these conversations between pickets and truck drivers? A. Within the last two weeks.

Q. And will you describe what occurred on that last or most recent incident?

Mr. Dunn: May we have the date, please, Mr. Examiner?

Trial Examiner: Yes. Give us the date so far as you can

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best remember within the last two weeks. Bearing in mind that today is June 26.

The Witness: Well, it was on a Monday.

Trial Examiner: Monday about two weeks ago?

The Witness: Yes, sir.

Trial Examiner: All right.

Here is a calendar, Mr. Curtis.

The Witness: Today is the 26th. That would be—let me see—this calendar does not give the days. This starts off here—

Trial Examiner: Yesterday was Monday, which was June 25. Two weeks prior to that would be June 11. Is that your testimony?

The Witness: Yes, that is right, sir.

Trial Examiner: All right, sir.

Q. (By Mr. Kennedy) Will you tell us what you observed? A. I observed the truck stop in front of the store. The picket moved to the cab of the truck. The truck driver leaned over the wheel in the direction of the picket.

And as I said before, there was conversation between the picket and the truck driver. The picket then stepped back onto his line of picketing. The truck proceeded up Nichols Avenue and out of sight.

Q. And at what point was the picket when he stepped from the sidewalk to the truck? What part of your store?

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A. As I recall, it was close to the corner which would be as you turn to go into the entrance of the store, which would be right at the intersection of the parking lot and the corner of the building.

Q. Is that on Nichols Avenue? A. On Nichols Avenue, yes.

Trial Examiner: What truck was this?

Q (By Mr. Kennedy) Do you know what truck it was? A. I don't recall the name of the trucking company.

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Trial Examiner: I think we have to distinguish for the purposes of this record, you see, and I will insist upon this distinction, that the truck which stopped in front of the store and a conversation then ensued between a picket and the driver of that truck, the driver of the truck, that that truck was bound for the Curtis Brothers Store or warehouse.

Now, you, I take it from the testimony that you are attempting to adduce from this witness, want me to draw an inference that having stopped in front of the store—now, I may be a little previous in this, because I have not listened you out on all the testimony you intend to adduce—but up

to the present moment, I can only see that an inference would have to be drawn.

That is, you would want the Examiner to draw an inference that the truck having stopped in front of the store, a conversation then taking place between a picket and the driver of that truck, the truck then proceeding on up Nichols Avenue, that that truck had some shipment or some business at the Curtis Brothers store?

Mr. Kennedy: Well, Mr. Examiner, I would only want you to conclude—not necessarily infer—but conclude from

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the entire pattern of conduct which not only includes the testimony which has just been adduced but which was adduced yesterday with reference to taking of numbers and tallying of customers in the area in which the pickets were patrolling—that their activity is, first, something other than organizational picketing.

Now, there we get into the heart and main issue of this case.

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Q. (By Mr. Kennedy) You have just testified; I believe, Mr. Curtis that there was another incident approximately two weeks prior to June 11. Without comparing it to the one that you have just told us about, will you tell us what took place at that time? A. As I recall it, this was, this incident, was a large freight trailer. And he pulled up in front of the store.

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All right. You may proceed with your answer, sir.

The Witness: A large freight trailer—he stopped in front of the store; the picket walked over to the cab of the

truck; the driver leaned over, and there was conversation. Possibly three minutes. The picket stepped back onto the picket line, and the truck proceeded up Nichols Avenue out of sight.

Q. (By Mr. Kennedy) Where were you when you observed this? A. Standing on the parking lot.

Q. Where was the truck? A. In front of the store.

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Q. Now, Mr. Curtis, you stated that you go down to the store normally every day. Would you tell us the area in which these pickets have been patrolling?

Trial Examiner: What period of time?

Mr. Kennedy: During the last two months.

The Witness: They have been picketing in front of the store which the entrance leads off of Nichols Avenue.

Q. (By Mr. Kennedy) Have you observed any pickets on V Street? A. I have not.

Trial Examiner: When the witness describes the pickets in front of the store, I take it from the testimony of the witness yesterday that the front of the store contains the display windows on Nichols Avenue; is that what you mean by the front of the store?

The Witness: That is right, sir.

Trial Examiner: The actual entrance to the store is not on Nichols Avenue?

The Witness: It is off the parking lot.

Trial Examiner: Off the parking lot?

The Witness: Yes, sir.

Trial Examiner: And the pickets were not—or were the pickets in front of the entrance to the store?

The Witness: Well, to describe it, you would have to—they would have to go across the picket line to get into the store.

Trial Examiner: No. I am not asking you that question, Mr. Curtis.

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You are testifying with respect to where the pickets patrolled. Did the pickets patrol in front of the display windows on Nichols Avenue?

The Witness: That is right.

Trial Examiner: Did they patrol in front of the entrance to the store which abuts the parking lot?

The Witness: That is correct.

Trial Examiner: They patrolled both places?

The Witness: Yes, on Nichols Avenue.

Mr. Kennedy: I think he misunderstood your question, Mr. Examiner.

Trial Examiner: Yes.

Is it all right with you gentlemen —

Mr. Kennedy: I had a picture—

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Trial Examiner: Now, Mr. Curtis, I show you this Trial Examiner's Exhibit Number 1 in evidence, and I ask you what distance is covered, or what the area is in feet, from

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the left hand side of this exhibit, which is V Street—is that correct?

The Witness: That is right.

Trial Examiner: —along Nichols Avenue, which covers the present parking lot up to the sidewalk on the side of the furniture store.

The Witness: 85 feet.

Trial Examiner: And the sidewalk is how wide?

The Witness: Five feet.

Trial Examiner: All right.

Now, the present entrance to the furniture store is along the side of the building abutting the parking lot; is that correct?

The Witness: That is right.

Trial Examiner: What distance is there from the front of the store on Nichols Avenue along the sidewalk to the entrance at the side of the store?

The Witness: Approximately forty-five feet.

Trial Examiner: Now, I understand that this is the only entrance to the furniture store at the present time; is that correct?

The Witness: That is right.

Trial Examiner: And that entrance was opened when?

The Witness: In the early part of March.

Trial Examiner: Of 1956?

The Witness: Yes, sir.

Trial Examiner: And prior to March of 1956 and from 1938 until March of 1956, where was the entrance to the furniture store?

The Witness: There. (Indicating). Nichols Avenue.

Trial Examiner: You are pointing to a spot on Nichols Avenue; is that correct?

The Witness: Yes.

Trial Examiner: And that Nichols Avenue front of the store consists of what at the present time?

The Witness: Show windows.

Trial Examiner: And those show windows have been there since what date, as they presently exist?

The Witness: That would have been in April.

Trial Examiner: In April of 1956?

The witness: That is right.

Trial Examiner: All right.

Now, do you have any further questions?

Well, one other question:

This sort of blank wall which appears on this exhibit, the entrance of which is on V Street, what is that building?

The Witness: Warehouse and furniture display. I could give it to you more specifically in floors if you would like.

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Trial Examiner: What is the name and number of the building?

The Witness: Building 3.

Trial Examiner: Is this known as Warehouse Number 3 which was testified to here yesterday?

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Q. (By Mr. Kennedy) Mr. Curtis, in answer to the Trial Examiner's question concerning the only entrance, you testified that along the side of your furniture store, that that was the only entrance.

That is your only customers' entrance, isn't it? A. That is right.

Q. Now, looking at this picture, which now has the designation "Warehouse 3" on it, there is a door or an entrance in the front of warehouse 3 that faces on V Street? A. That is right.

Q. And where do your employees go to work? A. Through that entrance.

Q. And what is the—you have testified about the distances running along Nichols. Can you tell us the approximate distance between the corner of Nichols and V Street to that entrance used by the employees facing on V Street in front of Warehouse 3? A. They travel from here to the corner and down.

Q. Just take it from the corner of V and Nichols down to that door? A. Approximately a hundred feet.

Could I change that?

Q. Well, we want it accurate. A. I was just thinking here: It is 130 feet from this corner to here; so it would have to be the same distance from here to here.

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And again there is another possibly thirty feet from there to the corner. So, it is a hundred and thirty and thirty, which would be a hundred and sixty.

Q. That is from the corner of V and Nichols Street to the door used by your employees in going to work? A. That is right.

Q. Now, first, does this picture show the spot where your deliveries are made that are made by trucking companies? A. Yes, they are made through this door and—

Q. When you say "this door" you are pointing to the front of Warehouse 3? A. Warehouse 3, yes, sir. And warehouse 5.

Trial Examiner: Does that entrance to Warehouse 5 also face on V Street?

The Witness: It does.

Q. (By Mr. Kennedy) Now, I am now pointing in the picture to the first floor and the area near the intersection of warehouse 3 and your main store. What is that square there designated? A. That is also a receiving entrance there. That is used occasionally. It is used for just certain merchandise that we take in that door.

Q. Where would the entrance to that come from? Would it be from V Street or from Nichols Avenue? A. From V Street.

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Mr. Kennedy: I have no further questions on that.

Mr. Dunn: May I ask a few questions on it?

Trial Examiner: Yes. On the Exhibit.

Q. (By Mr. Dunn) Mr. Curtis, from March up to the present time I understand you testified that the pickets were patrolling in front of the store. And I am looking at

Nichols Avenue, the display windows in the front of the store. Where else did they patrol? Would you point to the picture? A. At the present time?

Q. From March up to the present time? A. Well, they —from March until now—well, of course, as we have extended the lot they have extended their line of picketing.

Q. Across the parking lot? A. Yes, that is right.

Q. In other words, they are picketing not only in front of the store but they are picketing in front of the parking lot? And I am pointing in front of the parking lot. A. I don't remember seeing them up there that far. They have been confined to the original parking lot and the front of the store.

So, I would say there line of picketing was 40 plus 20 which is 60 feet on Nichols Avenue.

Q. You pointing to the edge of the front of the store on Nichols Avenue, about 20 feet southward toward the parking lot? A. That is right.

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Q. And your recollection is that they have not picketed the front of the parking lot? A. I have never seen them up this far.

Trial Examiner: Well, this is in front of the parking lot. The 20 feet is in front of the parking lot to some extent?

Mr. Dunn: Well, may I clear that up?

Q. (By Mr. Dunn) Is this a walking entrance here to the left of the front of the building? A. Well, well, could I have a pencil?

The sidewalk is here, see, it runs right down here, which it sticks out there, approximately five or six feet from here. Then, there is an exit driveway out here on to Nichols Avenue.

Q. This is an exit you just pointed out to which is about 20 feet? A. Yes.

Q. This is an exit on Nichols Avenue from the parking lot? A. That is right.

Q. I assume your testimony is that they had picketed in front of the furniture store plus this 20 feet which is an exit from the parking lot? A. That is right.

Q. Now, there has been no picketing, of course, from Nichols Avenue towards the entrance to the furniture store proper? A. No.

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Q. Have you had occasion to observe picketing at all times in the last two months? A. I have.

Q. Now, by what door do your employees leave work? A. Through the V Street entrance.

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CROSS-EXAMINATION

Q. (By Mr. Dunn) In answer to the last question, did you testify that there was no picketing in front of the entrance to the warehouse number 3 in the last two months? A. That is right.

Q. This is June. Would you say that goes back to last April? A. Within the last two months I haven's observed any picketing in front of V Street.

Q. In front of the V Street entrance? A. That is right.

Q. I call your attention to the instance that the canopy on it in the corner of the "L"—that is between the furniture store and warehouse number 3, do you see that entrance with the steps to it? A. Yes.

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Q. Has this entrance ever been used? A. Yes.

Q. What has it been used for? A. To get from the store to the parking lot.

Q. By customers? A. By customers.

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Q. I understand that. But for how long a period of time did they use that entrance, the customers, to get from the store to the parking lot? A. Oh, approximately five years.

Q. Up until now—how long ago did you tell us? A. When we officially opened this entrance.

Mr. Kennedy: Let the record show he is pointing to the entrance that runs down from Nichols Avenue along the side of the main store.

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Mr. Dunn: Your testimony therefore, is that the employees at no time used this particular entrance?

The Witness: That is right.

Trial Examiner: Let's describe it as the canopy covered entrance at the intersection of the "L".

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Q. Now, Mr. Curtis, you started off your testimony, if you recall, by saying that there were six occasions where trucks "Passed by". Do you remember that testimony? A. Yes.

Q. Then, you gave us an incident that occurred on June 11, 1956 where a truck stopped in front of the store. Do you recall that? A. Yes.

Q. You don't know what company's truck that was? A. That is right.

Q. Of course, you don't know the identity of the driver that was driving that truck? A. That is right.

Q. Do you know the identity of the picket who stopped and whom you observed talking to the driver of this truck? A. I do not.

Q. Now, you also gave us an incident that occurred some time two weeks prior to June 11. And that was a large freight trailer. Do you recall that? A. I do.

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Q. Again you do not know the company whose truck that was? A. That is right.

Q. And, of course, you don't know the identity of the driver? A. That is right.

Q. And you don't know the identity of the picket? A. That is right.

Q. And you don't know what they discussed? A. I do not.

Q. Now, either of these two trucks would have had to travel approximately a block before they were to make deliveries to your store if they made deliveries in the first place, isn't that correct? A. That is right. A half a block.

Q. Well, half a block.

Mr. Dunn: That is all.

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RECROSS-EXAMINATION

Q. (By Mr. Dunn) Mr. Curtis, subsequent to October of 1955, has there been any doubt in your mind that Local 639 does not represent the employees involved?

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The Witness: There has not been any doubt in my mind.

Q. (By Mr. Dunn) In other words, there is not a question in your mind but that Local 639 does not represent the employees? A. That is right.

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L. A. TRAINHAM

was called as a witness for and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Kennedy) Where are you employed, Mr. Trainham? A. With the Truck Drivers, Local 639.

Q. Is that the Drivers, Chauffeurs and Helpers Local Union 639? A. That is right.

Q. Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers of America, AFL-CIO; is that right? A. Yes, sir.

Q. What is your title, if any? A. Recording Secretary and Business Agent.

Q. How long have you held either or both of these titles? First, how long have you been Recording Secretary? A. I think about three years.

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Q. How long have you been business agent? A. About fifteen.

Q. Fifteen years? A. About fifteen, approximately.

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Q. (By Mr. Kennedy) I show you what is in evidence as General Counsel's Exhibit Number 3. That is your signature, is it not? A. That is right.

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Q. Did you write that letter? A. I signed that letter on advice of my counsel.

Q. Who prepared the letter? A. My counsel, I guess.

Mr. Dunn: It is stipulated that Martin F. O'Donoghue prepared the letter.

He signed the letter under advice of counsel. That is what the testimony is.

Trial Examiner: Do you want to accept that stipulation?

Mr. Kennedy: Yes.

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Q. (By Mr. Kennedy) Did you assign the pickets to picket duty at Curtis Brothers following the time that you submitted this letter, General Counsel's Exhibit 3? A. I did.

Q. And do you presently have charge of the pickets at Curtis Brothers? A. Well, indirectly, yes. It is to go

over their like I used to—I don't do that any more. But we still have a picket line over there.

Q. Who assigns the pickets? A. The organizer.

Q. Who is he? A. Fuller.

Q. Did you ever assign any of them to picket there? A. Yes.

Q. Did you give them any instructions?

Mr. Dunn: When? Give them any instructions when?

Q. (By Mr. Kennedy) When did you assign pickets to picket Curtis Brothers? A. The first time you mean?

Q. Well, have you assigned any since February 16, 1955? A. Yes.

Q. When is the most recent time you have assigned pickets for picket duty here? A. I have more or less assigned and been in charge of the pickets through my direction since that time.

Q. Have you given them any instructions as to what they

are to do? A. I have given the organizers and them both instructions.

Q. What were those instructions? A. The normal ones you would give pickets.

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Q. Well, will you tell us? A. To start with, to keep their picket duty, keep their nose clean and talk to nobody, especially the bosses or nobody else. Just keep on walking unless some of the members or somebody stops and asks them a question.

And after this letter you are referring to, I instructed the pickets that we were, according to our counsel, now picketing for organizational purposes only.

Q. Did you tell them anything else? A. That is about all I think.

Q. Now, you stated that you told them that according to your counsel you are now engaged in organizational picketing only.

Is it your testimony that you told these pickets to say nothing to anybody? A. I was talking about any management.

Q. Did you give them any instructions with reference to anybody else? A. No.

Q. Did you give them anything else to take with them other than picket signs? A. No, sir.

Q. And they do not carry any literature of any kind? A. From what time are you speaking of?

Trial Examiner: Well, I take it that the questions referred to the time subsequent to February 16, 1955?

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Mr. Kennedy: Yes, subsequent to February 16, 1955.

The Witness: Not to my knowledge, no.

Q. (By Mr. Kennedy) And they do not carry cards or—authorization cards, or application cards? A. All of the

pickets at times do have authorization cards—application cards.

Q. All of them? A. Have had at times, yes.

Q. Now, you presently are picketing Curtis Brothers; isn't that right? A. That is right.

Mr. Dunn: When you say you, you don't mean him personally?

Mr. Kennedy: No, I don't mean you as an individual. But your union is picketing Curtis Brothers?

The Witness: That is right.

Q. (By Mr. Kennedy) And what is the purpose of that picketing? A. Organizational picketing.

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Q. (By Mr. Kennedy) Mr. Trainham, you are seeking to get a contract from Curtis, are you not?

Mr. Dunn: I object to the question.

The Witness: No, sir.

Q. (By Mr. Kennedy) You are not? A. No, sir.

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Q. (By Mr. Kennedy) Mr. Trainham, calling your attention to just a couple of months ago in April of 1956, do you remember having conversation with an Examiner from the Labor Board named Wallerstein? A. I had a conversation with someone from the Labor Board. I do not recall what his name was.

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Q. (By Mr. Kennedy) Do you recall that the subject of the conversation—first, as to where it was, do you recall that it was in Mr. Dunn's office? A. Mr. Dunn's office, that is right.

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Q. And who was there? A. Mr. Dunn and a man from the Labor Board and myself.

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Q. I can appreciate that there has been some time gone by, and that these things help you to recall. And that is perfectly all right.

Now, let me see if this doesn't refresh your recollection. After that question was asked: didn't you answer just as I said that all the company has to do is sign a contract and we will remove; and at that time Mr. Dunn immediately interceded, and said just a moment, you are not going to make a case in my office which brought about what you now describe as the argument? How about that? A. I recall the argument. I don't recall me answering his question, no.

Q. Is it your testimony that you did not answer him? A. I don't recall it.

Q. Could you have answered it? A. I could have; but I don't recall answering it.

Q. Then you could have answered it in the way I stated? A. Not to my recollection. I don't recall answering it.

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Q. Well, did you—if you can't recall, you could have answered it? A. I could have done a lot of things, but I am not going to sit up here and tell you something today I don't recall back a moment ago.

Q. But it is possible, isn't it? A. It is possible.

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Trial Examiner: It is a matter of official record that a

hearing was held on a certain date in February. What is the date, Mr. Kennedy?

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Mr. Kennedy: February 28, 1955.
Trial Examiner: What is the date of the letter?
Mr. Kennedy: February 16, 1955.
Trial Examiner: All right. Now, you have the two dates.

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Q. (By Mr. Kennedy) Do you recall in one of the recesses of that hearing that in the hall talking with George Curtis? A. I talked, I think, to two of them, to tell you the truth, or spoke to them and talked with them, yes.

Q. And you said to them at that time—or at least one of them, did you not—why don't we get together and sign a contract? That is all that is necessary. A. No, sir.

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Q. (By Mr. Kennedy) Don't you recall that after you

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came back from the recess that Mr. Taylor, who is sitting on my left here, told Mr. Humphrey the hearing office in that case that during the recess that you had told Mr. George Curtis that all you had to do was get together on a contract and that Mr. Humphrey then asked you, and asked your Counsel if that had taken place? And you all agreed? A. I don't recall it. We may have agreed. It may have been stated, but I don't recall saying it.

Q. It may have been? A. That is right. But I don't recall it if it did.

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Q. (By Mr. Kennedy) Mr. Trainham, at the outset of this hearing, your Counsel, Mr. Dunn, made a statement

in his opening remarks that the Union had not signed up any of the employees of Curtis. That is, that they did not represent any of them at the moment.

Do you agree with that statement? A. To the best of my knowledge, that is correct, yes, sir.

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Q. When did you decide to change picket signs?

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The Witness: I couldn't give you the exact date. It was at the advise of our Counsel. When it was decided I couldn't tell you. I don't keep all the dates of the meetings and things.

Q. (By Mr. Kennedy) You say it was on advise of your Counsel?

Then, you didn't discuss with the employees whether the signs should be changed or not, is that correct? A. With the employees?

Q. With the members of 639? A. It was probably discussed with the members of 639, with our Counsel, sure.

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Q. (By Mr. Kennedy) Mr. Trainham, who decided that the wording in the picket signs should be changed? A. On the advise of our Counsel.

Q. Who decided that this letter should be written, General Counsel's Exhibit 13? A. Martin of O'Donoghue.

Q. And it was Martin of O'Donoghue who prepared it; is that correct? A. That is right.

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CROSS-EXAMINATION

Q. Did you at the time—personally, that is—advise any member of your union to refuse to cross that picket line subsequent to October 13, 1955? A. Before that?

Trial Examiner: No, after that.

Q. (By Mr. Dunn) Did you after October 13, 1955, advise any member of your union to refuse to cross that picket line at Curtis Brothers? A. No.

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Q. (By Mr. Dunn) In your role as agent and chief of the pickets at Curtis Brothers, did you get any information from the pickets or from the head picket of any incident as of the first Mr. Curtis described it?

Mr. Kennedy: Objection.

Trial Examiner: Overruled.

The Witness: I heard of—by the way of mouth I have heard of several, yes.

Q. (By Mr. Dunn) Of what? A. I have heard of sev-

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eral incidents, a number to times. Some drivers pull up there and talk to the pickets and go on.

Trial Examiner: This is hear say.

The Witness: This is only hear say. They pull up and talk to the pickets and go on.

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Trial Examiner: Let me see that Exhibit.

Mr. Trainham, isn't it a fact that the union, Local 639, provides pickets with the signs that they carry?

The Witness: Yes sir.

Trial Examiner: And isn't it a fact that these two documents, General Counsel's Exhibits 4-A and 4-B, which are photostates of picket signs carried by pickets at the Curtis Brothers store, were provided to these pickets by the union?

The Witness: Yes, sir.

Trial Examiner: And you recognized these documents as photostates of those signs that were so carried and provided by the union?

The Witness: I do.

Trial Examiner: And prior to the carrying of these

General Counsel's Exhibits 4-A and 4-B, other signs were carried by pickets; is that so?

The Witness: That is right.

Trial Examiner: And were those other signs also provided by the union to those pickets?

The Witness: Yes, sir.

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REDIRECT EXAMINATION

Q. (By Mr. Kennedy) You stated, Mr. Trainham, that subsequent to October 13, you have not advised members to refuse to cross the picket line at Curtis Brothers?

Do you recall that testimony? A. Yes.

Q. You have had occasion, haven't you, to have inquiries made of you by drivers when they see them as to what they should do? A. That is right, a lot of them.

Q. And on those occasions what do you advise them? A. I always advise them to do whatever they thought best. I wasn't going to tell them to cross it, and I wasn't going to tell them not to cross it.

Q. You say that has happened often? A. Often. Employers have asked me that, some of your people, and everybody else.

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Q. With respect to the Curtis Brothers situation? A. I am talking about Curtis Brothers.

Q. And within the last couple of months, would you say? A. Yes.

Q. And on all those occasions, did you tell them to do what they thought best? A. That is right.

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Q. (By Mr. Dunn) Since October of 1955, has any of your union members been penalized for crossing the picket line at Curtis Brothers? A. Absolutely not.

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Q. (By Mr. Dunn) You were requested, Mr. Curtis, by me and by the Trial Examiner, to produce any and all bills of lading or invoices from Roadway Express for the latter part of 1955.

I assume that that they are absent, and you have none? A. I got that information over the telephone, sir.

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Q. (By Mr. Dunn) Have you made a search of the records? A. I have, sir.

Q. Have you found any bills of lading? A. Yes, sir. I found on September the 20th, that there was a shipment of six cartons of chairs.

Q. Six cartons of what? A. Six cartons of chairs, received from Roadway. That bill of lading was 2601,177, 1954.

Now, we have the bill of lading of that shipment. And we have the receiving form. That is made out by our stock clerk. Now, that doesn't necessarily mean—

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Trial Examiner: You have such a bill of lading showing the receipt of six cartons of chairs from Roadway Express?

All right. Go ahead, Mr. Dunn.

Q. (By Mr. Dunn) Now, this would mean, would it not, that six cartons of chairs were received on September the 20th, from your consignor—or from whom is—or from whomever you purchased these chairs. A. That is right.

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Q. Your records do not show that anything was either delivered or received from Roadway, subsequent to September 20, 1955? A. That is right, sir.

Q. Nothing up until the present time, to your knowledge? A. No, sir.

I think you asked from July of 1955 until the end of 1955. I think that is what you asked for.

Q. That is right.

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THOMAS DUNN

was called as a witness, and having been duly sworn was examined and testified as follows:

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The Witness: My name is Thomas Dunn. I am an attorney. My office is in the Tower Building.

I represent Local 639, together with Martin of O'Donoghue, who is in the Tower Building.

Sometime, to the best of my recollection, in March of 1956, I received a call from Louis Wallerstein, who is a Field Examiner for the 5th region in Baltimore. He made arrangements with me to met with Mr. Trainham, Mr. Fuller, Sr., and myself, to discuss the case that is now before the Trial Examiner. He asked me if I would produce Mr. Trainham and Mr. Fuller. And I told him that I would. On this particular morning, I met him at 10:30 in the morning in my office.

He asked me—

Mr. Kennedy: May I interrupt you. Have you fixed the date on that?

The Witness: I estimate it is sometime in the middle of March.

If you have the date of Mr. Wallerstein, I will accept that, because I have it on my calendar back in my office, but I haven't been able to find it.

To the best of my recollection, it was in March; probably the early part of April.

Mr. Kennedy: I know there was such a meeting on April 18th. I don't know whether you are talking of something different.

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The Witness: Then, April 18th, I will accept that. It was April 18th; it was in the morning in my office.

Trial Examiner: Mr. Dunn, was there more than one meeting that you had with Mr. Wallerstein and these gentlemen?

The Witness: No, sir, not in this particular case.

So, April 18th would be the only time that I discussed with Mr. Wallerstein in the presence of Mr. Trainham.

After a number of questions, both Mr. Trainham and Mr. Fuller that were put by Mr. Wallerstein, the question

was put to Mr. Trainham: "What would it take in order to remove these pickets?"

To the best of my knowledge, that was the exact language as used by Mr. Wallerstein.

That question was put to Mr. Trainham, I am frank to say that the question came out of the clear sky. We were not talking about any such thing as what would it take to remove these pickets. And Mr. Trainham started to answer the question. And I told him to stop. And I told Mr. Wallerstein that he was not to come to my office and try to prove a case for the National Labor Relations Board, and particularly with that type of question. And I am pretty sure I called it dirty question. And I probably called it a number of other things. And that was the end of that incident. And there was nothing further said, either by Mr. Trainham, Mr. Wallerstein, Mr. Fuller or myself in respect to what would it take to remove the pickets from Curtis Brothers.

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CHARLES W. FULLER

was called to the stand as a witness, and having been first duly sworn, was examined and testified as follows:

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Direct Examination.

Q. (By Mr. Dunn) Mr. Fuller, are you employed by Local 639? A. I am organizer for the Teamsters Joint Counsel No. 55.

Q. As an organizer for Teamsters Joint Counsel 55, did you have anything to do with the strike at the Curtis Brothers Furniture Store or anything to do with the picketing at the Curtis Brothers Furniture Store in 1954 or 1955? A. Yes, sir.

Q. 1956? A. Yes, sir.

Q. What was your capacity there at the—your official capacity? A. My official capacity as organizer and in charge of the strike—organizer in charge of all strikes.

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Q. Were you at the strike scene—that is, at the plant, at the store,—when the employees of Curtis Brothers went out on strike? A. Yes, sir.

Q. After February 16, 1955, were you there at the scene of the picketing? A. Yes, sir.

Q. How often would you be there? A. Well, every day. That is, very few days I missed. I would be from one to three times a day, and sometimes night time.

Q. And as an average, Mr. Fuller, how long during the course of the day you would be there? A. Well, it was hard to tell. Anywhere from all hours to all day. Or I might just stop by.

Q. Now, after—strike that. I will show you Trial Examiner's Exhibit Number 1. As the Curtis Brothers Furniture Store existed today, is that a fair representation of the scene and does it depict properly Nichols Avenue, which is in the foreground, and V Street which is to the left? A. That is a fair scene as it is today, yes.

Q. Now, looking at the Exhibit—strike that. At the time that the picketing started—that is, when the employees first went out on strike, where was the picketing? A. On V Street and on Nichols Avenue.

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Q. Yes. Did there come a time when the picketing on—at those two locations that you have just cited—did there come a time when that changed? A. Yes.

Q. About when was that, approximately? A. I think it was February of 1955. I am not sure of the date.

Q. I am not asking you the type of picketing. I am asking you if the location of the pickets changed? A. Yes, the location of the pickets changed, but I don't know the exact date.

Q. Well, in order to refresh your recollection would you say it would be sometime in October or November of 1955? A. I think that would be about right, somewhere about that.

Q. Somewhere around there? A. Yes.

Q. Now, at the present time how many pickets are on the site? A. At the present time we have three. One in the mornings, and two in the afternoons.

Q. And how many would picket at the present time? A. I think most of the time one. It could be possibly two.

Q. And where are they patrolling? A. On Nichols Avenue, along here.

Q. When you say on Nichols Avenue— A. Yes.

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Q. Look at the right picture, which is the front corner of the store? A. Yes.

Q. How far from the front corner, going towards the parking lot would you say they picketed? A. I think up along about here, just across—just beyond the trash box. The reason of that is because there used to be a variety store here. They wasn't allowed to picket in front of some other business.

Q. So at the present time—

Trial Examiner: Let's note for the report, Mr. Dunn, where the witness is pointing to on the Exhibit. And I gather he was pointing at mid-way in the parking lot; is that correct?

The Witness: Just about mid-way, I imagine. Just beyond the trash box there. Or lamp post.

Trial Examiner: All right.

Q. (By Mr. Dunn) Now, would you state the reason of

the Union why the pickets no longer patrolled on V Street—on V Street where warehouse No. 3 and warehouse No. 5 are located? A. Because as an organizer I felt we had to cut down the pickets. We wasn't getting anywhere with them on V Street, due to the fact that the Curtis' were either in the street or inside the building looking out the window; and I was trying to make contact with them. And I felt it would be to my advantage to keep them in the front of the building where I could see them go across to the bowling

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alley or down to the restaurant, or maybe could see one of them around the corner there somewhere out of sight.

Q. Did the employees ever talk to you or any of the pickets on the V Street side? A. Not to the best of my knowledge.

Q. And the reasons you say for that was because the Curtis Brothers were always— A. Yes, they wouldn't even speak to you, now.

Trial Examiner: What does he mean "They"?

The Witness: The employees.

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Q. Yes. Now, at lunch time, how did they—did you see any of the employees at lunch time? A. Yes, some of them would go to the bowling alley.

Q. Looking at the picture again, Exhibit Number 1 of the Trial Examiner's, how did you see them coming out of warehouse 3 or 5? Where did they walk? A. Because they would walk from across the parking lot, across Nichols

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Avenue to the bowling alley or either go down Nichols Avenue to the restaurant. And sometimes they went to the drug store.

Q. Were you able to—

Trial Examiner: We had better get a description for the record of the location of the bowling alley and the drug store.

Q. (By Mr. Dunn) Explain for the record where the bowling alley, the restaurant and the drug store are? A. The bowling alley is across the street, just a little more than below Curtis' place of business on Nichols Avenue.

Trial Examiner: Toward the bridge?

The Witness: Sir?

Trial Examiner: Toward the 11th street bridge?

The Witness: And the drug store is down a half a block across the street toward the bridge. Then there is a restaurant on Nichols Avenue on the left hand clear down the street just before you get to Good Hope Road.

Q. (By Mr. Dunn) Were you able to talk to the pickets either at this point in front of the store,—rather talk to the employees, either at this point in front of the store, at the bowling alley, the restaurant or the drug store? A. Yes.

Mr. Kennedy: I object to the form of the question. I think he knows what he means. But he has asked if he was able to talk.

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Q. (By Mr. Dunn) Did you talk, Mr. Fuller? A. Yes, we have talked to them and spoke to them. And we have tried to get them together in a meeting. One time—I think a couple of times we thought we have them all lined up.

Mr. Kennedy: I object to anything further than the answer.

Mr. Dunn: I am asking, Mr. Fuller, if you did talk?

Trial Examiner: The answer is yes.

The Witness: Yes.

Q. (By Mr. Dunn) And you talked to them about what? A. About organization.

Q. About joining Local 369? A. No, 639.

Trial Examiner: Could we have approximate times and dates and so forth?

Q. (By Mr. Dunn) Did you talk to them about joining Local 369? Pardon me, 639—after February 17, 1955? A. I have spoke to numerous of them. And I have talked to some of them—

Q. Mr. Fuller, let me show you an Exhibit. Have you ever seen this document dated February 16, 1955? A. Yes, sir.

Q. After February 16, 1955, did you talk to any of the employees—any of the drivers or the warehousemen in re

spect to organization? A. Yes, sir.

Q. And when you talked to these people after they had crossed the parking lot and went down to the drug store or the bowling alley or the restaurant, what did you talk to them about?

Mr. Kennedy: Objection unless we have a time fixed for this.

Mr. Dunn: After February 16, 1955.

Trial Examiner: The objection if overruled. You may testify and then try to fix the time more accurately, please.

The Witness: Well, it is awful hard for me to fix a time because I tried to make contacts whenever I could.

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Q. (By Mr. Dunn) Your testimony is that you were talking to them after February 16, 1955, whenever you could? A. My job is—

Q. Organizing them in the union? A. Talk to them anytime I can regardless of how long it takes.

Q. How long did these pickets remain in front of the

store? Did they stay there after 5:00 o'clock in the afternoon? A. Yes, sir.

Q. Will you tell the Trial Examiner why they stayed there after 5:00 o'clock in the afternoon? A. Well, because the place of business stays open until 9:00 o'clock and they have employees working up to that time.

Q. Were you endeavoring to organize any employees of Curtis Brothers other than the drivers and warehousemen? A. Yes, sir. We were attempting to organize the salesmen or any employees Curtis might have.

Q. And how long do the salesmen work? A. I think the majority of them work until nine o'clock. I am not sure. I don't know their hours.

Q. Did you ever talk to any of the salesmen? A. Yes, we have talked to salesmen.

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Q. This gentleman who is—his name you don't know, you talked to him about organizing the salesmen? A. Yes, sir.

Q. Did you talk to him after 5:00 o'clock in the afternoon? A. To definitely state the time I wouldn't want to say, because as I say I am over different times of the day. It could be in the evening, or—

Q. Well, did you try to see the salesmen as you tried to see the drivers and warehousemen? A. I tried to see the employees, regardless of the time or who they were. That is my job.

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Trial Examiner: Well, will you concede then that deliveries were made and that deliveries were made by trucks which were union organized?

Mr. Kennedy: Yes, sir.

When we say deliveries, I don't mean all deliveries were made, but certainly deliveries by trucks were made that were unionized.

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Cross-Examination.

Q. (By Mr. Kennedy) Mr. Fuller, you stated that you were in charge of the organization of Curtis' employees back in 1953? A. Whenever it started, yes.

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Q. And did you organize them at that time by talking to them when you could find them, where you could find them? A. Yes, sir. As a matter of fact, it took me six months to strike up the first conversation.

Q. Did you talk to them at various places at which you were? A. Yes, sir. I talked to the first one in front of the variety store on Nichols Avenue where the parking lot is now at.

Q. Did you talk to them at the bowling alley and the drug store? A. Wherever I could meet them, coming to work or wherever I would bump into one.

Q. And you did not have pickets there at that time, did you? A. No, sir. As a matter of fact I passed out hand bills in front of the store. And I seen I wasn't getting anywhere with that, so I stopped.

Q. You're talking now of 1953? A. I mean on V Street, warehouses. I went down and passed out hand bills. And as fast as I could give one to them, they would hand it to Mr. Curtis inside. So I stopped that.

Q. That has—that was about 1953 for the first time? A. Yes, sir.

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Q. You have testified that after February 16, 1955, that

you were there—when I say there, I mean in the vicinity or area of Curtis Brothers Store—did you say almost every day? A. Was there at the store?

Q. Yes. A. Very few days I missed. There might be a day I was busy; I might drive by and not stop. But most of the time I stopped and parked. I parked either on Nichols Avenue or V Street or wherever I could find a parking place. And I didn't always stay in front of the store. I stayed in the bowling alley or down at the drug store or anywhere around and near the Curtis strike unless I had some other business to take care of.

Q. You're talking now of recent times? A. Recent times, yes. I wasn't over as often as recently because I have been tied up on two or three other things. But I very seldom missed a day.

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Q. How long would you stay there when you would go there? A. Well, anywhere from, I would say, around a couple of hours. It could be half a day. It could be all day according to how busy I was.

Q. Did you say you may not be right in front of the store? Part of that time you would be over in the bowling alley? A. Yes, sir.

Q. Or the drug store? A. Yes, sir. In that vicinity of Curtis Brothers.

Q. Now, did you have charge of the pickets that are there and have been there recently? When I say that, I mean do you assign them there? A. No, I don't assign the pickets there, no, sir, not all of them. 639, the union, they belong to, assigns the pickets.

Q. Well, do you have any control over them? A. Yes, sir.

Q. If you found a picket there that didn't seem to be doing what he was supposed to do, would you check into that? A. Yes, sir.

Q. Do you give them any instructions? A. Yes, sir.

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Trial Examiner: You may answer the question as you know how. What did you tell the pickets?

The Witness: I tell them I want them to picket and be orderly. I don't want them to interfere or cause any dis-

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turbance or anything like that.

Trial Examiner: Tell us when you gave those instructions?

The Witness: That was the starting of the strike and during the time of the strike; to see that they walked, and walked in front of the place of business, and behaved themselves, and were orderly at all times. And I didn't want no disturbance there.

Q. (By Mr. Kennedy) Well, now, you have changed pickets periodically, haven't you? A. Yes. sir.

Q. Well, then, bring this up closer to the present time, say, within the past six months, what instructions have you given to any of the pickets that you have assigned there? A. On order of the Counsel I instructed the pickets that it was an organizational strike. I didn't want them to speak nor talk to anybody; to picket, not to cause any interference with any deliveries or anybody going into the store or anything. They were just to picket. If they could strike up a conversation with one of the employees after they took the signs off, at the bowling alley or in the restaurant or wherever they might meet, to see if we couldn't set up a meeting with the employees. Or if they sometimes would ask them—let me know which direction they go, where they hang out; so I might contact them. But they were merely there for organizational purposes only.

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Q. Your instructions were that while they were carrying the sign they were not to say anything to anybody; is that correct? A. Yes, sir.

Q. Now, you stated that you talked to employees of Curtis. Can you name one? A. No. Off-hand I couldn't. I don't think he was there at the time after we changed the signs, because I happened to know his name. But we don't ask their names when we meet them. We speak to them and try to make friends with them and try to see if we can't interest them in joining the union or try to find the key man who might set up a meeting with the other employees at the union hall or some place to negotiate where we might be able to organize them into 639.

Q. Is it your testimony that your presently attempting to organize the salesmen in Curtis Company? A. I am attempting to organize any employees that might be on Curtis' payroll.

Q. Is that something you—or were you always doing that? A. Always. I am general organizer for the Teamsters Joint Counsel of the Teamsters.

Q. As such you are interested in organizing anybody who is unorganized? A. That is right. In Washington, D. C., we have an organization Committee that meets every Thursday. We organize anybody. We meet every Thursday morn-

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ing. And we organize anybody whether they are under our jurisdiction or not.

Q. Well, you're interested in organizing them. That— A. That's my job. That is what I get paid for.

Q. What salesmen, if any, have you organized at Curtis? A. I haven't organized any. I didn't say I organized them. I said we were attempting to organize them.

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Q. Now, these pickets that you have had there at Curtis, over the period of the last six months, how many different individuals have you used on picketing?

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The Witness: Off-hand I couldn't say. I would say, maybe six or seven. I am not sure just how many were used. I don't remember.

Q. (By Mr. Kennedy) Are they all colored men?

Mr. Dunn: I object to that.

Trial Examiner: Overruled.

The Witness: At the present time, yes. They haven't been all the time.

Q. (By Mr. Kennedy) At the present time they are? A. Yes.

Q. And none of them is an employee of Curtis; that is true, isn't it?

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The Witness: At the present time, no.

Q. (By Mr. Kennedy) And none of them that you are presently using ever was an employee of Curtis? A. Not at the present time. They were up until—

Trial Examiner: You have answered the question.

Q. (By Mr. Kennedy) The employees of Curtis that you are trying to organize now they are white men, aren't them?

A. Not all of them.

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183 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted.]

No. 14347

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Mr. Herbert S. Thatcher for petitioner. Messrs. Martin F. O'Donoghue and Thomas X. Dunn also entered appearances for petitioner.

Mr. Norton J. Come, Deputy Assistant General Counsel, National Labor Relations Board, with whom Messrs. Jerome D. Fenton, General Counsel, National Labor Relations Board, Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, and Duane B. Beeson, Attorney, National Labor Relations Board, were on the brief, for appellee.

Opinion

Decided November 26, 1958

Before WILBUR K. MILLER, BAZELON and WASHINGTON Circuit Judges

184 BAZELON, Circuit Judge: This appeal presents the question whether peaceful picketing to achieve recognition by members of a union which does not claim to represent a majority of the bargaining unit violates § 8(b)(1)(A) of the National Labor Relations Act, where no majority union has been certified.[1]

[1] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(1)(A) (1952). This section provides that:

In 1953 the National Labor Relations Board certified the petitioner union as exclusive representative for an appropriate unit of employees of Curtis Brothers, Inc., a District of Columbia mover and retail furniture operator. After unsuccessful collective bargaining negotiations, petitioner called a strike and commenced to picket the employer's various establishments. The picketing continued for about two years during which time the employer discharged the striking help and replaced them with nonunion employees. As a result of the events of these two years, the union lost decisively a new representative election conducted early in 1955 at the instance of the employer. Petitioner continued to picket the retail store, asserting in its placard, inter alia, that Curtis Brothers employed non-union "Drivers, Helpers, Warehousemen, etc." This picketing was conducted by, at most, two union members at any one time, and was admittedly peaceful in all respects. Curtis Brothers filed an unfair labor
185 practice charge with the Board, claiming that the union's conduct violated § 8(b)(1)(A).

Relying mainly on previous Board decisions, the Trial Examiner concluded that the alleged conduct was not a violation as charged. The Board disagreed. It reasoned that the picketing was intended to impose economic injury upon the employer so long as he refused to recognize the union as bargaining agent for its employees, that any loss to the employer might reasonably jeopardize the employees' economic status, and that as a result of such threatened effect the employees might be influenced against their will to join the picketing union. The Board found that the picketing therefore restrained and coerced the employees in the exercise of their right to bargain collectively through representatives of their own choosing. It consequently held petitioner's conduct violated § 8(b)(1)(A)

"(b) It shall be an unfair labor practice for a labor organization or its agent—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 * * *."

Section 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952), provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

and ordered the union to cease and desist. This is the order we review.

The Board interpretation of § 8(b)(1)(A), and of the meaning of "coerce and restrain," presents implications of serious and far reaching consequences. But extended discussion by us would only duplicate the very complete and able expositions of the issues in the Examiner's decision, the Board's opinion, and in the opinions of the concurring and dissenting members.[2]

186 We adopt the positions expressed by the Trial Examiner and the Board's dissenting member Murdock in holding that § 8(b)(1)(A) is inapplicable to peaceful picketing, whether "organizational" or "recognitional" in nature, subject always to the limitations of § 8(b)(4)(C). Broadly stated, we find this conclusion necessitated by the impact which § 8(b)(1)(A) would have upon other provisions of the Act were any different interpretation adopted. For example, if § 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, § 13, which prohibits interference with the right to strike except as specifically provided for elsewhere in the Act, would effectively be expunged therefrom;[3] § 8(b)(1)(A) is not specifically directed to picketing

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[2] Trial Examiner's Intermediate Report and Recommended Order, Case No. 5-CB-190 (1956); Local 639, International Brotherhood of Teamsters, AFL-CIO, 119 N.L.R.B. No. 33, Lab. Rel. Rep. (41 L.R.R.M. 1025) (1957). See also the numerous excellent discussions by legal commentators of the scope of § 8(b)(1)(A) generally, and of the import of the Board's decision in Curtis Brothers more particularly. E.g., Cox Labor Law 299-304, 872-76 (3d ed. 1954). Cox, Some Current Problems in Labor Law: An Appraisal, 35 L.R.R.M. 48 (1955); Bornstein, Organizational Picketing in American Law, 46 Ky. L.J. 25, 57-61 (1957); Note, 42 Minn. L. Rev. 459 (1958); Note 44 Va. L. Rev. 741 (1958); Note, 67 Yale L.J. 1462 (1958).

[3] 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1952), provides:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

See NLRB v. International Rice Milling Co., 341 U.S. 665 (1951), for a discussion of § 13.

The use of "strike" in § 13 has been construed to apply to picketing as well. See Sales Drivers AFL v. NLRB, 97 U.S. App. D.C. 173, 229 F. 2d 514, cert. denied, 351 U.S. 972 (1955); International Brotherhood of Teamsters 87 NLRB 502, 507-08 (1949).

or striking. In fact, it is one of the most general provisions of the entire Act. Similarly, since § 8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of § 8(b)(1)(A) would make the former section entirely redundant.[4]

187 Legislative history and post-legislative history both confirm this interpretation of § 8(b)(1)(A). Although ambiguities do exist in the legislative history of that provision, the overall impression clearly emerging is that peaceful picketing to secure recognition is not prohibited by the Act.[5] And while conduct and expressions of attitude subsequent to the enactment of legislation are not necessarily determinative of the meaning of that legislation, in this case the legislators principally responsible for § 8(b)(1)(A), and the Board itself, have, for the ten years since its enactment, adhered to the interpretation which this court now adopts.[6] Such universal acceptance of this interpretation presents a convincing confirmation of our views.

188 The order of the Board is therefore set aside and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

WILBUR K. MILLER, Circuit Judge, dissenting: Although rejected by the Curtis employees by a vote of 28 to one, the

[4] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(4)(C) (1952): "(b) It shall be an unfair labor practice for a labor organization or its agents to—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

[5] Board member Murdock convincingly discusses the legislative history of the Act, see note 2 supra. For similar interpretation by the Board itself, see National Maritime Union, 78 N.L.R.B. 971 (1948).

[6] See sources cited at note 2, supra.

union thereafter continued to picket the company. The Board held that, under these circumstances, the picketing constituted a violation of § 8(b)(1)(A) of the Taft-Hartley Act [1] in that it restrained or coerced employees in the exercise of guaranteed rights, saying inter alia:

"* * * There can be no more direct deprivation of the employees' freedom of choice than to impose upon them a collective bargaining agent they have not chosen or have expressly rejected. * * *"

There can be no doubt that the purpose of the Teamsters' picketing was either to compel Curtis employees to join the union in order to keep on working, or to put pressure on the employer to grant recognition to the very union its employees had just rejected.[2]

Section 8(b)(1)(A) of the Labor Act makes it an unfair labor practice for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed" in § 7.[3] The latter section guarantees to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of
189 their own choosing, and * * * to refrain from any or all of such activities * * *."

When these two sections of the statute are read together, it becomes clear that it is immaterial whether the union restrains or coerces the employees directly or through the medium of the employer. For using the employer as an economic club does not protect the union from a charge of illegal coercion if such coercion in fact results. Thus, both of the only two possible purposes of the picketing are illegal. The purposes of it being unlawful under the plain language of the Act, the picketing itself is, of course, illegal.

In effect, the majority hold it lawful for the Hoffa labor organization, after it had been repudiated almost unanimously by the employees, to put a picket line around the place of business in an effort to force the employer to tell the employees to join the union or be discharged—i.e., in an attempt to force the employees into the union they had just emphatically re-

[1] 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A).

[2] After the union lost the election, the pickets carried signs reading: "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours and working conditions."

[3] 61 Stat. 140 (1947), 29 U.S.C. § 157.

jected. Such an interpretation of the Act, which I think is clearly wrong, is an invitation to labor racketeers and hoodlums to use its processes for unlawful purposes.

190 In United States Court of Appeals
for the District of Columbia Circuit

No. 14,347

[File endorsement omitted.]

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION No. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS WAREHOSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Request for Enforcement of an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Bazelon and Washington, Circuit Judges.

Judgment

November 26, 1958

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case is set aside and that the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge BAZELON.

Dated: November 26, 1958.

Separate dissenting opinion by Circuit Judge Wilbur K. Miller.

192 [Clerk's certificate to foregoing transcript omitted in printing.]

193 Supreme Court of the United States

No. 717, October Term, 1958

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION No. 639, ETC.

Order allowing certiorari

April 20, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.—

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 26, 1958.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 15–21) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 12–60)[1] are reported at 119 NLRB 232.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, p. 22) was entered on November 26, 1958.

[1] "R." references are to the Joint Appendix filed in the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether peaceful picketing by a union which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent, is an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *
>
> SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *
>
> * * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

A. THE BOARD'S FINDING OF FACTS

In September 1953, the Union[2] was certified by the National Labor Relations Board as the exclusive bargaining representative of the drivers, helpers, warehousemen and furniture finishers of Curtis Brothers, following its victory in a Board-conducted election (R. 13; 95, 114). The Union and the Company thereafter entered into contract negotiations, and eventually reached agreement on all subjects with the exception of union security (R. 13, 64; 115, 140–141). An impasse was reached on this point, and on February 26, 1954, the Union struck in support of its contract demands (R. 13, 64; 115). Nine of the 21 employees in the bargaining unit joined in the strike (R. 64; 115). Picket lines were established in front of the Company's store and also in front of its warehouse. The warehouse, through which all the employees in the unit entered and left the premises, forms an "L" wing with the store and faces a side street (R. 13, 64–65; 116, 124, 126, 152).

Thereafter, the 9 strikers were replaced, and the

[2] Respondent, Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters. The employer, Curtis Brothers, is engaged, in Washington, D.C., in the retail furniture, storage, household moving and rug cleaning businesses (R. 63–64).

Company continued to remain open for business. The picketing continued, however, and was in effect at the time of the hearing before the Board trial examiner, in June and July 1956, nearly two and one-half years later (R. 13, 117, 124–125, 144). At the outset of the strike as many as 15 or 20 pickets patrolled together, but as time went on the number was reduced to about 6, and finally, from about November 1955 on, no more than two pickets appeared, neither of whom was an employee of the Company (R. 65, 67; 116, 117, 125, 181).

On February 1, 1955, about one year after the strike had begun, the Company filed a petition with the Board requesting that a representation election be held to determine whether the employees in the bargaining unit continued to desire the Union to represent them (R. 13; 101, 117–118). The Union opposed the holding of such an election, and mailed to the Board's regional director a letter prepared by Union counsel stating that the Union "herewith abandons all claims to exclusive recognition as the majority bargaining representative" of the employees involved (R. 14; 97, 158–159). On February 17, 1955, the day after the above letter was mailed, the Union for the first time during the strike did not picket the Company's place of business. It resumed the picketing the next day, however, with changed signs (R. 65; 118–119). Prior to February 17, the legend on the picket signs had read: "Curtis Brothers on strike. Unfair to organized labor" (R. 14; 117). Thereafter, two legends were used, which read, respectively: "Curtis Bros. employs nonunion drivers, helpers,

warehousemen and etc. Unfair to Teamsters Union No. 639, AFL," and "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours, and working conditions" (R. 14; 99, 100, 119, 166). Following a hearing in the representation case, the Board found, contrary to the Union's contention, that the Union "was still seeking to win immediate recognition by the Company," and therefore directed that an election be conducted (R. 14; 101–105). The election was held in October 1955, with 28 employees voting against the Union and only one employee voting for it (R. 14; 106, 108).

The picketing continued after the election as before, ordinarily consisting of two pickets carrying the signs which were adopted following the letter of disclaimer in February 1955 (R. 67; 125, 144, 160). Shortly after the election, however, the picketing was confined to the sidewalk area starting in front of the store and extending to a driveway exit from the parking lot, which was contiguous to the store. No further picketing was carried on, as it had been theretofore, in front of the warehouse where the single employee entrance is located (R. 67; 124, 126, 149, 152, 154–155). The pickets patrolling in front of the store could be seen from the warehouse entrance only by looking diagonally across the parking lot over a distance of about a city block (R. 126–127, 152). The pickets during this period were present from about 8:30 in the morning until the store's closing at 9 in the evening, although the employees in the unit worked from 8 in the morning until 5 in the after-

noon (R. 67; 133–134). The pickets neither talked with the employees nor distributed literature to them while on patrol (R. 67; 160, 179–80).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (with one member dissenting) concluded that, even after it had been rejected by a majority of the employees in a Board-conducted election, the Union continued to picket the Company for the purpose of compelling it to grant the Union immediate recognition as the employees' exclusive representative (R. 15). The Board further concluded that picketing by a minority union for such a recognition objective restrains and coerces the employees involved in the exercise of their right of free choice in the selection of a representative, in violation of Section 8(b)(1)(A) of the Act (R. 17–20, 23–33).

To remedy the foregoing violation, the Board's order requires the Union to cease and desist from restraining or coercing the Company's employees in the exercise of their rights guaranteed in Section 7 of the Act, and to post appropriate notices (R. 33–34).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with one judge dissenting) set aside the Board's order (*infra*, pp. 15–21). The court concluded that "§ 8(b)(1)(A) is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature," being impelled to this conclusion "by the impact which § 8(b)(1)(A) would have upon other provisions of the Act were any different interpretation adopted" (*infra*, pp. 17–18). Thus, as the Court explained (*infra*, p. 18):

> * * * if 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, § 13, which prohibits interference with the right to strike except as *specifically* provided for elsewhere in the Act, would effectively be expunged therefrom; § 8(b)(1)(A) does not specifically sanction picketing or striking. * * * Similarly, since § 8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of § 8(b)(1)(A) would make the former section entirely redundant.

REASONS FOR GRANTING THE WRIT

1. The question whether Section 8(b)(1)(A) of the Act interdicts picketing by a minority union to compel recognition as exclusive bargaining agent is of major importance, not only in the administration of the Act, but also in the conduct of labor-management relations generally.[3] Unions frequently utilize this economic weapon to further their goals, and a decision as to its propriety would obviously have a significant bearing on the balance of power in labor disputes affecting commerce. Moreover, since its holding in the instant case that minority picketing for recognition is violative of Section 8(b)(1)(A), the Board has had a substantial number of unfair labor practice cases involving such activity. Thus, in the 16-month period since the Board decison herein, the Board has had occasion, at the final adjudication stage, to apply

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[3] The question presented is solely one of application of the statute. On the facts as found by the Board, the picketing was clearly not protected by the First Amendment. *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284.

it in about 14 cases,[4] and 6 of these are now pending on petition for enforcement or review in various courts of appeals.[5]

In these circumstances a resolution of the question by this Court is clearly appropriate. Indeed, since Section 10(f) of the Act gives any person aggrieved

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[4] *Machinists, Lodge 942 (Alloy Mfg. Co.)*, 119 NLRB 307; *Operating Engineers, Local 12 (Shepherd Machinery Co.)*, 119 NLRB 320; *Teamsters, Local 641 (Ruffalo's Trucking Service)*, 119 NLRB 1268; *Joint Council of Sportswear Workers (Harou and En Tour)*, 120 NLRB No. 90; *Retail Store Employers Union, Local 1595 (J. C. Penney Co.)*, 120 NLRB No. 189; *Paint, Varnish & Lacquer Makers Union (Andrew Brown Co.)*, 120 NLRB No. 89; *Teamsters, Local 420 (Fisk & Mason)*, 120 NLRB No. 19; *Teamsters, Local 196 (Biltmore Mfg. Co.)*, 120 NLRB No. 219; *Teamsters, Local 912 (H. A. Rider & Sons)*, 120 NLRB No. 199; *Machinists, Local 311 (Machinery Overhaul Co.)*, 121 NLRB No. 153; *Teamsters, Local 182 (The Alling & Cory Co.)*, 121 NLRB No. 39; *Department Store Employees, Local 1100 (Lane Bryant)*, 121 NLRB No. 86; *United Rubber, Cork, Linoleum and Plastic Workers (O'Sullivan Rubber Corp.)*, 121 NLRB No. 185; *Local 1922, Electrical Workers (Mid-Island Electrical Sales Corp.)*, 122 NLRB No. 105.

[5] *National Labor Relations Board* v. *Paint, Varnish & Lacquer Makers Union (Andrew Brown Co.)*, No. 16204 (C.A. 9); *National Labor Relations Board* v. *United Rubber, Cork, Linoleum and Plastic Workers (O'Sullivan Rubber Corp.)*, No. 7781 (C.A. 4); *Joint Council of Sportswear Workers (Harou and En Tour)* v. *National Labor Relations Board*, No. 14486 (C.A.D.C.); *Retail Store Employers Union, Local 1595 (J. C. Penney Co.)* v. *National Labor Relations Board*, No. 14557 (C.A.D.C.); *Machinists Lodge No. 311 (Machinery Overhaul Co.)* v. *National Labor Relations Board*, No. 14818 (C.A.D.C.); *National Labor Relations Board* v. *Teamsters, Local 182 (The Alling & Cory Co.)*, No. (C.A. 2). See also *National Labor Relations Board* v. *Machinists, Lodge No. 942 (Alloy Mfg. Co.)*, No. 15814 (C.A. 9), decided February 4, 1959, where the court declined to consider this issue because of the union's failure properly to raise the question before the Board.

by a Board order the option of instituting proceedings in the court below, its decision herein, unless reviewed by this Court, could effectively block the Board from carrying out what it believes to be a proper interpretation of Section 8(b)(1)(A). For, in every case where the Board applies that interpretation, the respondent could bring the case into the court below, which, pursuant to its decision herein, would proceed to set aside the Board's order.[6]

2. The holding of the court below is erroneous. It rests on the twin premises that: (1) since Section 8(b)(1)(A) does not specifically outlaw strikes or picketing, to make it applicable to minority picketing for recognition would be contrary to Section 13, which provides that nothing in the Act, "except as specifically provided for herein," shall interfere with the right to strike; and (2) interdicting such picketing under Section 8(b)(1)(A) would make redundant Section 8(b)(4)(C), which expressly makes recognition picketing illegal if another union has been certified as the employees' representative. Both of these premises are demonstrably incorrect.

It is well settled that strikes or picketing may be found to transgress particular provisions or policies of the Act even though they do not outlaw such activity in express terms. Thus Section 8(b)(2)

[6] As shown in n. 5, *supra*, of the 6 cases now pending in the courts of appeals, 3 are in the court below. The court below, moreover, has recently stated that: "One panel of this court will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling." *Insurance Agents' Union* v. *National Labor Relations Board*, 43 LRRM 2003, certiorari granted, No. 557, this Term.

does not expressly prohibit strikes,[7] yet it has consistently been held to encompass strikes to compel an employer to discriminate in violation of that section.[8] Similarly, although Section 7 of the Act affirmatively confers the right to engage in "concerted activities for * * * mutual aid or protection," it is clear that neither this provision nor Section 13 privileges strikes or other concerted activities which are contrary to the basic policies of the Act or of other relevant laws.[9] And, as the court below itself concedes (p. 18, *infra*), Section 8(b)(1)(A) clearly does outlaw violent strikes and picketing,[10] although the section does not mention strikes or picketing as such. In short, the question of whether Section 8(b)(1)(A) proscribes minority picketing for recognition depends not on whether that section expressly refers to such activity, but on whether the language of the provision, viewed in the light of Congress' purposes,

[7] In relevant part, Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *."

[8] See *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392 (C.A. D.C.), certiorari denied, 340 U.S. 934; *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 688–689 (C.A. 2), certiorari denied, 338 U.S. 954; *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782, 802–803 (C.A. 7), certiorari denied on this issue, 344 U.S. 812.

[9] See the discussion on this point in *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 258–265. See also, *National Labor Relations Board* v. *Local 1229, Electrical Workers*, 346 U.S. 464.

[10] See *National Labor Relations Board* v. *United Mine Workers*, 195 F. 2d 961 (C.A. 6), certiorari denied, 344 U.S. 920.

may fairly be said to encompass that activity. If, on this analysis, conduct would fall under Section 8(b)(1)(A), there has been sufficient "specific provision" for its prohibition to take it out of the protection of Section 13.

The Board's conclusion that Section 8(b)(1)(A) covers picketing by a minority union to compel recognition is a reasonable one. The objective sought—the grant of exclusive bargaining rights to an organization which does not enjoy the support of a majority of the employees—is plainly in derogation of the employees' Section 7 right to select a representative of their own choosing or none at all. And the means utilized to attain that objective—the imposition of economic pressure against the employer's business—would tend to restrain and coerce the employees involved, for damage to the employer's business in turn foreshadows a loss of employment or a reduction in wage rates for his employees. Accordingly, the Union's conduct here would meet the requirements for a violation of Section 8(b)(1)(A)—*i.e.*, restraint or coercion of employees in the exercise of the rights guaranteed in Section 7—no less than other union efforts to abridge employees' rights through adversely affecting job tenure.[11] This conclusion is confirmed, moreover, by the legislative history of Section 8(b)(1)(A). Although one of the purposes of this pro-

[11] See *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 837–839 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3); *National Labor Relations Board* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9); *National Labor Relations Board* v. *George D. Auchter Co.*, 209 F. 2d 273, 275–277 (C.A. 5).

vision was to interdict union violence and mass picketing,[12] that was not its only purpose. An equally important objective was to impose, insofar as possible, the same restrictions on unions which Section 8(1) of the Wagner Act imposed on employers against intrusion upon protected employee activity.[13] Since an employer violates the Act if he grants exclusive recognition to a minority union,[14] the legislative purpose of an even-handed application of the "restrain or coerce" phraseology is accomplished by construing Section 8(b)(1)(A) to reach a minority union's imposition of economic pressure to gain such recognition. Indeed, during the legislative debates, the proponents of Section 8(b)(1)(A) cited, as examples of union conduct intended to be proscribed thereby, peaceful picketing which threatened to cause a shutdown of operations and thereby deprive employees of their jobs unless they joined an unwanted union.[15]

Nor is a different conclusion required by the contention that the Board's interpretation of Section 8

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[12] See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668–669.

[13] See Leg. Hist. of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 456, 1018, 1021, 1032, 1199, 1203–1204, 1206–1207.

[14] An employer would violate Section 8(a)(1), which makes it an unfair labor practice for him to restrain his employees in the exercise of their Section 7 rights, and Section 8(a)(2), which makes it unlawful for him to give assistance or support to any labor organization. See *National Labor Relations Board* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (C.A. 9); cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267.

[15] See Leg. Hist., pp. 1020, 1029, 1030.

(b)(1)(A) would render redundant Section 8(b)(4)(C), which proscribes recognition strikes or picketing where another union has been certified as the employees' representative. Section 8(b)(4)(C) reaches recognition strikes and picketing even when the union seeking representation rights is a majority union [16]—a not uncommon situation where the certification in favor of another union is of several years' duration. That is, in Section 8(b)(4)(C), Congress sought to protect the integrity of an outstanding certification against economic attacks by a rival union; hence, until revoked under the peaceful procedures of the Act (Section 9(c)), the certification is entitled to presumptive validity for purposes of that section even though the rival union may have, in the meantime, succeeded in winning a majority of the employees away from the certified union.[17] Section 8(b)(1)(A), on the other hand, applies where there is no outstanding certification and where the union seeking recognition does not represent a majority of the employees. Furthermore, the history of Section 8(b)(1)(A) negates any implication that Section 8(b)(4)(C) was intended to be the exclusive provision respecting recognition picketing. Section 8(b)(4)(C) was contained in the Senate Bill as it was

[16] See *Paint Makers Union* (*Andrew Brown Co.*), 120 NLRB No. 89.

[17] See *Meat and Provision Drivers Union, Local 626* (*Lewis Food Co.*), 115 NLRB 890. Cf. *Parks* v. *Atlanta Printing Pressmen*, 243 F. 2d 284 (C.A. 5), certiorari denied, 354 U.S. 937; *Tungsten Mining Corp.* v. *District 50, etc.*, 242 F. 2d 84 (C. A. 4), certiorari denied, 355 U.S. 821.

reported out of committee, while Section 8(b)(1)(A) was not. The latter was added on the floor, because certain members of the Senate Labor Committee, including Senators Taft and Ball, felt that the Committee Bill did not go far enough in its regulation of union activities,[18] and, in the course of the debates, they indicated (n. 15, *supra*) that it was designed to cover, *inter alia*, the situation here. In these circumstances, the adoption of Section 8(b)(1)(A) by the Senate can only be viewed as an enlargement upon the provisions of the bill as reported by the Senate Committee—including Section 8(b)(4)(C). And, since the Senate bill as thus amended was the bill ultimately adopted by both Houses, this conclusion carries over to the law as enacted.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Deputy Assistant General Counsel,
National Labor Relations Board.

FEBRUARY 1959.

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[18] See Leg. Hist., pp. 113, 456–462.

APPENDIX

In the United States Court of Appeals
For the District of Columbia Circuit

No. 14347

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided November 26, 1958

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

BAZELON, *Circuit Judge:* This appeal presents the question whether peaceful picketing to achieve recognition by members of a union which does not claim to represent a majority of the bargaining unit violates § 8(b)(1)(A) of the National Labor Relations Act, where no majority union has been certified.[1]

[1] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(1)(A) (1952). This section provides that:

"(b) It shall be an unfair labor practice for a labor organization or its agent—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 * * *."

In 1953 the National Labor Relations Board certified the petitioner union as exclusive representative for an appropriate unit of employees of Curtis Brothers, Inc., a District of Columbia mover and retail furniture operator. After unsuccessful collective bargaining negotiations, petitioner called a strike and commenced to picket the employer's various establishments. The picketing continued for about two years during which time the employer discharged the striking help and replaced them with non-union employees. As a result of the events of these two years, the union lost decisively a new representative election conducted early in 1955 at the instance of the employer. Petitioner continued to picket the retail store, asserting in its placard, *inter alia,* that Curtis Brothers employed non-union "Drivers, Helpers, Warehousemen, etc." This picketing was conducted by, at most, two union members at any one time, and was admittedly peaceful in all respects. Curtis Brothers filed an unfair labor practice charge with the Board, claiming that the union's conduct violated § 8(b)(1)(A).

Relying mainly on previous Board decisions, the Trial Examiner concluded that the alleged conduct was not a violation as charged. The Board disagreed. It reasoned that the picketing was intended to impose economic injury upon the employer so long as he refused to recognize the union as bargaining agent for its employees, that any loss to the employer might reasonably jeopardize the employees' economic status,

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Section 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952), provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

and that as a result of such threatened effect the employees might be influenced against their will to join the picketing union. The Board found that the picketing therefore restrained and coerced the employees in the exercise of their right to bargain collectively through representatives of their own choosing. It consequently held petitioner's conduct violated § 8(b)(1)(A) and ordered the union to cease and desist. This is the order we review.

The Board interpretation of § 8(b)(1)(A), and of the meaning of "coerce and restrain," presents implications of serious and far reaching consequences. But extended discussion by us would only duplicate the very complete and able expositions of the issues in the Examiner's decision, the Board's opinion, and in the opinions of the concurring and dissenting members.[2]

We adopt the positions expressed by the Trial Examiner and the Board's dissenting member Murdock in holding that § 8(b)(1)(A) is inapplicable to peaceful picketing, whether "organizational" or "recognitional" in nature, subject always to the limitations of § 8(b)(4)(C). Broadly stated, we find this conclusion necessitated by the impact which § 8(b)(1)(A) would have upon other provisions of the Act

[2] Trial Examiner's Intermediate Report and Recommended Order, Case No. 5–CB–190 (1956); Local 639, International Brotherhood of Teamsters, AFL-CIO, 119 N.L.R.B. No. 33, Lab. Rel. Rep. (41 L.R.R.M. 1025) (1957). See also the numerous excellent discussions by legal commentators of the scope of § 8(b)(1)(A) generally, and of the import of the Board's decision in Curtis Brothers more particularly. *E.g.*, Cox, Labor Law. 299–304, 872–76 (3d ed. 1954); Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 L.R.R.M. 48 (1955); Bornstein, *Organizational Picketing in American Law*, 46 Ky. L.J. 25, 57–61 (1957); Note, 42 Minn. L. Rev. 459 (1958); Note, 44 Va. L. Rev. 741 (1958); Note, 67 Yale L.J. 1462 (1958).

were any different interpretation adopted. For example, if § 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, § 13, which prohibits interference with the right to strike except as *specifically* provided for elsewhere in the Act, would effectively be expunged therefrom;[3] § 8(b)(1)(A) does not specifically sanction picketing or striking. In fact, it is one of the most general provisions of the entire Act. Similarly, since § 8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of § 8(b)(1)(A) would make the former section entirely redundant.[4]

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[3] 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1952), provides:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

See *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951), for a discussion of § 13.

The use of "strike" in § 13 has been construed to apply to picketing as well. See *Sales Drivers AFL* v. *NLRB*, 97 U.S. App. D.C. 173, 229 F. 2d 514, *cert. denied*, 351 U.S. 972 (1955); *International Brotherhood of Teamsters*, 87 NLRB 502, 507–08 (1949).

[4] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(4)(C) (1952):

"(b) It shall be an unfair labor practice for a labor organization or its agents to—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where

Legislative history and post-legislative history both confirm this interpretation of § 8(b)(1)(A). Although ambiguities do exist in the legislative history of that provision, the overall impression clearly emerging is that peaceful picketing to secure recognition is not prohibited by the Act.[5] And while conduct and expressions of attitude subsequent to the enactment of legislation are not necessarily determinative of the meaning of that legislation, in this case the legislators principally responsible for § 8(b)(1)(A), and the Board itself, have, for the ten years since its enactment, adhered to the interpretation which this court now adopts.[6] Such universal acceptance of this interpretation presents a convincing confirmation of our views.

The order of the Board is therefore set aside and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

WILBUR K. MILLER, *Circuit Judge*, dissenting: Although rejected by the Curtis employees by a vote of 28 to one, the union thereafter continued to picket the company. The Board held that, under these circumstances, the picketing constituted a violation of

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an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

[5] Board member Murdock convincingly discusses the legislative history of the Act, see note 2 *supra*. For similar interpretation by the Board itself, see *National Maritime Union*, 78 N.L.R.B. 971 (1948).

[6] See sources cited at note 2, *supra*.

§ 8(b)(1)(A) of the Taft-Hartley Act[1] in that it restrained or coerced employees in the exercise of guaranteed rights, saying *inter alia:*

> * * * There can be no more direct deprivation of the employees' freedom of choice than to impose upon them a collective bargaining agent they have not chosen or have expressly rejected. * * *

There can be no doubt that the purpose of the Teamsters' picketing was either to compel Curtis employees to join the union in order to keep on working, or to put pressure on the employer to grant recognition to the very union its employees had just rejected.[2]

Section 8(b)(1) of the Labor Act makes it an unfair labor practice for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed" in § 7.[3] The latter section guarantees to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and * * * to refrain from any or all of such activities * * *."

When these two sections of the statute are read together, it becomes clear that it is immaterial whether the union restrains or coerces the employees directly or throught the medium of the employer. For using the employer as an economic club does not protect the union from a charge of illegal coercion if such coercion in fact results. Thus, both of the only two possible *purposes* of the picketing are illegal. The purposes of

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[1] 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1)(A).

[2] After the union lost the election, the pickets carried signs reading: "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours and working conditions."

[3] 61 Stat. 140 (1947), 29 U.S.C. § 157.

it being unlawful under the plain language of the Act, the picketing itself is, of course, illegal.

In effect, the majority hold it lawful for the Hoffa labor organization, after it had been repudiated almost unanimously by the employees, to put a picket line around the place of business in an effort to force the employer to tell the employees to join the union or be discharged—*i.e.*, in an attempt to force the employees into the union they had just emphatically rejected. Such an interpretation of the Act, which I think is clearly wrong, is an invitation to labor racketeers and hoodlums to use its processes for unlawful purposes.

Filed Nov. 26, 1958
Joseph W. Stewart
Clerk

In the United States Court of Appeals for the District of Columbia Circuit

No. 14347—September Term, 1958

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before WILBUR K. MILLER, BAZELON and WASHINGTON, *Circuit Judges*

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case is set aside and that the case is remanded to the National Labor Relations Board for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge BAZELON.

Dated: November 26, 1958.

Separate dissenting opinion by Circuit Judge WILBUR K. MILLER.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 34

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT DRIVERS, ETC., LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN REPLY.

HERBERT S. THATCHER,
1009 Tower Building,
Washington 5, D. C.
Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. . .

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION No. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT DRIVERS, ETC., LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN REPLY.

The Respondent, Drivers, etc., Local Union No. 639, International Brotherhood of Teamsters, takes no exception to the statements of Petitioner herein contained in those sections of its Petition for Writ of Certiorari herein entitled "Opinions Below," "Jurisdiction," "Question Presented," "Statute Involved" and "Statement."

ARGUMENT

As indicated by Petitioner Board herein, this case presents the important issue of whether Section 8(b)(1)(A)

of the National Labor Relations Act was intended by Congress, or can be used as a device by the Board, to outlaw picketing which, until the Board's decision in the instant case, has always been considered proper under the Act, and in which labor organizations from the beginning of their history have traditionally engaged. The type of picketing herein challenged is commonly known as "organization" or "recognition" picketing, and consists of peaceful picketing of an employer by a labor organization which represents less than a majority of that employer's employees for the purpose of obtaining organization and recognition as bargaining representative.

The factual frame in which the issue is presently before this Court involves the following situation: A union, after having won a Board-conducted election and been duly certified, is unsuccessful in negotiating a contract. Thereafter it engages in a strike in the course of which the striking employees are replaced by the employer so that the union loses its once majority. The employer then takes advantage of that portion of the Act which permits it to obtain an election, over the union's objection, in which election the striking former employees of the employer are not permitted to vote. The strikebreakers vote the union out, but the union nevertheless continues its picketing, this time seeking not a contract but the recognition which it once held. The Board then enjoins such picketing, invoking Section 8(b)(1)(A).

Prior to the decision of the Board in the instant case, Section 8(b)(1)(A) had never been thought available for that purpose; on the contrary, as indicated by the decision of the court below and the dissenting opinion of Board Member Murdock herein, that section had heretofore been thought to apply only to enjoining union conduct, whether carried on in connection with picketing or other type of activity, which is violent in nature and is designed directly to coerce employees in the intimidatory sense through fear of direct physical or economic retaliation.

That section, insofar as it had relation to picketing at all, was concerned with the manner or method of picketing and not the objects thereof which were dealt with in Section 8(b)(4). In other words, the section was intended to proscribe actual duress, not the indirect pressure that is the result of all picketing.

Notwithstanding all this, the Board has here found the necessary duress to exist in the mere possibility that the picketing might serve to cause economic loss to the employer, which in turn might be reflected by possible economic loss to the employees of the employer, so that this fear of possible economic loss operated to interfere with the free choice and selection of bargaining representatives given employees under Section 7 of the Act.

It is obvious that on the basis of the foregoing reasoning the Board could find justification for proscription of all picketing, regardless of its purpose or means. Whatever may be the rights of non-union employees to act as strike-breakers, or to choose to have no union to bargain for them, and to be protected from interference with these rights by the indirect and speculative "pressures" which are brought about by picketing, union employees have other equally important rights, including the right to engage in concerted activities for purposes of mutual aid and protection. Included in those rights is the right of union workers to seek, by picketing and other peaceful means, to extend organization and collective bargaining relationships throughout an entire trade or industry in particular areas as a means of stabilizing competitive wage rates and working conditions within such areas, and this right has long been recognized by our courts. *American Steel Foundries v. Tri-Cities Central Trades Council, et al.*, 257 U. S. 184; at 209; *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Exchange Bakery v. Rifkin*, 245 N. Y. 260, at 263; 157 N. E. 130, at 132.

Congress, in Section 7 of the Act, gave broad protection to the right of picketing for the purpose of mutual aid and protection, including the right to picket for recognition, but it did not stop there. Perhaps fearful of administrative at-

tempts to nullify such right through a process of interpretation, it enacted Section 13, under which it made clear that "all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read *only* if such interference, impediment or diminution is 'specifically provided for in the Act.'" (*N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665.)

Minority picketing for recognition is, of course, nowhere specifically proscribed in the Act and certainly not by any language in Section 8 (b) (1) (A), which, unlike Section 8 (b) (4) does not deal with striking or picketing as such. Furthermore, other sections of the Act, notably Section 8 (b) (4) (C), indicates that that right, far from being prohibited, is a protected right. In Section 8 (b) (4) (C) Congress undertook specifically to deal with "recognition" picketing and, very significantly, specifically outlawed such picketing *only* in the single instance where such picketing was carried on in the face of an existing Board certification of another union. The principle *expressio unius est exclusio alterius* would seem applicable, as would the statement of the Supreme Court of the United States in *Garner v. Teamsters Union*, 346 U. S. 485, at 499, where it is stated:

> "For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing."

If it is necessary, in view of the clear language of the Act as discussed above, to examine the legislative history to determine Congressional intent, that history conclusively demonstrates that Congress did not intend to proscribe peaceful picketing for recognition by minority unions or to give Section 8(b)(1)(A) the broad application ascribed to

it by the present Board majority. That history demonstrates that Congress, in enacting Section 8 (b) (1) (A), intended to deal only with certain intimidatory tactics of unions, whether engaged in in connection with picketing or in connection with other types of activities, which operated through violence or fear of violence directly to coerce non-striking employees in the exercise of their Section 7 rights. Section 8 (b) (1) (A) did not attempt to deal with picketing as such, or with the objects of picketing as such, and were intended only to proscribe actual duress and not indirect pressure.

Both Senator Ball who introduced Section 8 (b) (1) (A) on the floor of the Senate as an amendment to the Committee bill, and Senator Taft who was a principal sponsor, made this clear in their explanatory remarks made at the time the final version of 8 (b) (1) (A), as it presently appears in the Act, was explained and discussed on the Senate floor. In addition, a year later both of these Senators, as members and one as Chairman of the Joint Committee of Labor-Management Relations, 1948 (the so-called Taft-Hartley "Watchdog" Committee established under Title IV of the Act), signed a Report which expressly stated that:

> "a strike by a minority group of employees for recognition is not an unfair labor practice under the present Act. . . . A labor organization may lose in an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it."

It is further significant that in every Congress since the 80th, which enacted Taft-Hartley, bills were introduced to broaden the scope of Section 8 (b) (4) (C) so as to prohibit minority picketing for recognition, and in each instance such bills have failed of passage.

If the Board is correct in its present interpretation of the Act as already prohibiting minority picketing for recognition, Congress apparently has been laboring in vain these many years to decide whether to enact into law this same prohibition. What has actually happened, however, is that the present Board has rushed in where Congress has feared to tread and where all previous Boards have refrained from treading. The "balance" which the present Board has attempted to strike Congress has already struck for itself; Congress has made the choice. That choice may be pleasing to some and not to others, but it is for Congress and not the Board to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co. v. N.L.R.B.*, 338 U. S. 355, 363.

From the foregoing brief discussion, as well as from a reading of the decision of the court below and the dissenting opinion of Board Member Murdock herein, it would seem clear that the court below rightly decided this case against the Board's contentions, and Respondent accordingly opposes the Board's Petition to Review for that reason.

However, Respondent is obliged to agree with Petitioner that an issue of grave importance in the administration of the National Labor Relations Act and affecting the customary functioning of labor organizations under such Act is involved under the instant Petition for Certiorari. Accordingly, Respondent does not oppose the Petition herein insofar as that ground is asserted as a reason for this Court to assume jurisdiction to examine and decide the issue. Respondent is moved to take this position in view of the practice of the Board—a practice presently being en-

gaged in in regard to the issue in this case—of ignoring decisions of the court below with which it does not agree in other areas and Federal circuits where controversies involving the right of peaceful minority picketing arise. For this reason, and in view of the importance of the issue, it is desirable that a definitive ruling from this Court be obtained so that the same rule may be applied wherever the Board exercises its jurisdiction.

Respectfully submitted,

HERBERT S. THATCHER,
1009 Tower Building,
Washington 5, D. C.
Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 34

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 183–188) is not yet officially reported. The findings of fact, conclusions of law, and order of the Board (R. 12–60) are reported at 119 NLRB 232.

JURISDICTION

The judgment of the court of appeals (R. 188) was entered on November 26, 1958. Certiorari was granted on April 20, 1959 (R. 189). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(e).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *
>
> SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

QUESTION PRESENTED

Whether peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent is an unfair practice under Section 8(b)(1)(A) of the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDING OF FACTS

In September 1953, the Union [1] was certified by the

[1] Respondent, Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters. The employer, Curtis

National Labor Relations Board as the exclusive bargaining representative of the drivers, helpers, warehousemen and furniture finishers of Curtis Brothers, following its victory in a Board-conducted election (R. 13; 95, 114). The Union and the Company thereafter entered into contract negotiations, and eventually reached agreement on all subjects with the exception of union security (R. 13, 64; 115, 140–141). An impasse was reached on this point, and on February 26, 1954, the Union struck in support of its contract demands (R. 13, 64; 115). Nine of the 21 employees in the bargaining unit joined in the strike (R. 64; 115). Picket lines were established in front of the Company's store and also in front of its warehouse. The warehouse, through which all the employees in the unit entered and left the premises, forms an "L" wing with the store and faces a side street (R. 13, 64–65; 116, 124, 126, 152).

Thereafter, the 9 strikers were replaced, and the Company continued to remain open for business. The picketing continued, however, and was in effect at the time of the hearing before the Board trial examiner in June and July 1956, nearly two and one-half years later (R. 13, 117, 124–125, 144). At the outset of the strike as many as 15 or 20 pickets patrolled together, but as time went on the number was reduced to about 6, and finally, from about November 1955 on, no more than two pickets appeared,

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Brothers, is engaged in Washington, D.C., in the retail furniture, storage, household moving and rug cleaning businesses (R. 63–64).

neither of whom was an employee of the Company (R. 65, 67; 116, 117, 125, 181).

On February 1, 1955, about one year after the strike had begun, the Company filed a petition with the Board requesting that a representation election be held to determine whether the employees in the bargaining unit continued to desire the Union to represent them (R. 13; 101, 117–118). The Union opposed the holding of such an election, and mailed to the Board's regional director a letter prepared by Union counsel stating that the Union "herewith abandons all claims to exclusive recognition as the majority bargaining representative" of the employees involved (R. 14; 97, 158–159). On February 17, 1955, the day after the above letter was mailed, the Union for the first time during the strike did not picket the Company's place of business. It resumed the picketing the next day, however, with changed signs (R. 65; 118–119). Prior to February 17, the legend on the picket signs had read: "Curtis Brothers on strike. Unfair to organized labor" (R. 14; 117). Thereafter, two legends were used, which read, respectively: "Curtis Bros. employs nonunion drivers, helpers, warehousemen and etc. Unfair to Teamsters Union No. 639, AFL," and "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours, and working conditions" (R. 14; 99, 100, 119, 166). Following a hearing in the representation case, the Board found, contrary to the Union's contention, that the Union "was still seeking to win immediate recognition by the Company," and therefore directed that an election be conducted

(R. 14; 101–105). The election was held in October 1955, with 28 employees voting against the Union and only one employee voting for it (R. 14; 106, 108).

The picketing continued after the election as before, ordinarily consisting of two pickets carrying the signs which were adopted following the letter of disclaimer in February 1955 (R. 67; 125, 144, 160). Shortly after the election, however, the picketing was confined to the sidewalk area starting in front of the store and extending to a driveway exit from the parking lot, which was contiguous to the store. No further picketing was carried on, as it had been theretofore, in front of the warehouse where the single employee entrance is located (R. 67; 124, 126, 149, 152, 154–155). The pickets patrolling in front of the store could be seen from the warehouse entrance only by looking diagonally across the parking lot over a distance of about a city block (R. 126–127, 152). The pickets during this period were present from about 8:30 in the morning until the store's closing at 9 in the evening, although the employees in the unit worked from 8 in the morning until 5 in the afternoon (R. 67; 133-134). The pickets neither talked with the employees nor distributed literature to them while on patrol (R. 67; 160, 179–80).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (with one member dissenting) concluded that, even after it had been rejected by a majority of the employees in a Board-conducted election, the Union continued to picket the Company for the purpose of compelling it to grant the Union

immediate recognition as the employees' exclusive representative (R. 15). The Board further concluded that picketing by a minority union for such a recognition objective restrains and coerces the employees involved in the exercise of their right of free choice in the selection of a representative, in violation of Section 8(b)(1)(A) of the Act (R. 17–20, 23–33).

To remedy the foregoing violation, the Board's order requires the Union to cease and desist from restraining or coercing the Company's employees in the exercise of their rights guaranteed in Section 7 of the Act, and to post appropriate notices (R. 33–34).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with one judge dissenting) set aside the Board's order (R. 183–188). The court concluded that "§ 8(b)(1)(A) is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature," being impelled to this conclusion "by the impact which § 8(b)(1)(A) would have upon other provisions of the Act were any different interpretation adopted" (R. 185). The court stated (R. 185–186):

> * * * if 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, § 13, which prohibits interference with the right to strike except as *specifically* provided for elsewhere in the Act, would effectively be expunged therefrom; § 8(b)(1)(A) does not specifically sanction picketing or striking. * * * Similarly,

since §8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of §8(b)(1)(A) would make the former section entirely redundant.

SUMMARY OF ARGUMENT

I

A. One of the basic policies of the Act is to afford employees full freedom of choice in the designation of representatives for purposes of collective bargaining. Implementing this policy, Section 7 of the Act provides that employees shall have the right to bargain collectively through representatives of their own choosing and the correlative right to refrain from any or all such activity. To foist upon employees a bargaining representative unwanted by a majority of them thus clearly negates the statutory guaranty accorded to employees to select their own representatives or to have none at all. An employer who grants exclusive recognition to a union which lacks majority support restrains and coerces his employees in violation of Section 8(a)(1). By the same token, picketing of a minority union to compel recognition as the exclusive bargaining representative restrains and coerces employees in violation of Section 8(b)(1)(A).

Picketing for recognition by a minority union is designed to cause economic loss to the employer's business so long as he refuses to recognize the union. Such economic pressure, in turn, tends to restrain or coerce the employees, for business loss to the employer necessarily jeopardizes their economic status.

The threat thus posed to their livelihood prompts the employees to avoid the risk by foregoing their Section 7 rights and accepting the picketing union as their representative. Such economic compulsion constitutes restraint and coercion within the meaning of Section 8(b)(1)(A). Plainly, there is no more effective and unequivocal way to restrain an employee than by causing a deprivation of his livelihood.

Employer action threatening or adversely affecting job tenure has long been regarded as the classic example of restraint and coercion proscribed by Section 8(a)(1) of the Act. There is no meaningful basis for exempting minority picketing for recognition, which also threatens the employees' job tenure unless the employer yields, from the proscription of Section 8(b)(1)(A) against union restraint or coercion of employees in the exercise of their Section 7 rights.

B. The legislative history confirms this interpretation of Section 8(b)(1)(A). One of the major purposes which the sponsors of Section 8(b)(1)(A) sought to achieve was to impose on unions, insofar as possible, the same restrictions already imposed on employers by Section 8(a)(1) respecting intrusion upon protected employee activity. Bringing picketing by a minority union for recognition within Section 8(b)(1)(A) achieves the intended even-handed application of the two sections. An employer violates Section 8(a)(1) of the Act (as well as Section 8(a)(2)) by according exclusive recognition to a minority union. The union's conduct in this case is the counterpart of such employer action, for its objective is the same, namely, deprivation of the employees' right to

make a free choice with respect to representation. Accordingly, if Section 8(b)(1)(A) is to be given its intended equivalent meaning, it should reach the economic sanctions invoked by a minority union to achieve exclusive recognition, just as Section 8(a)(1) reaches recognition of a minority union by an employer.

C. The Board's interpretation of Section 8(b)(1)(A) does not prohibit legitimate union activity. The argument that equating peaceful picketing with restraint or coercion for purposes of Section 8(b)(1)(A) results, by logical extension, in proscribing a majority union's strike for recognition or contract concessions, overlooks the considerations which underlie the Board's reading of the statute. In the case of a majority union which is striking for recognition or contract concessions, there is no Section 7 right which is infringed and therefore an essential ingredient for a violation of Section 8(b)(1)(A) is lacking. Resort to economic sanctions by a majority union is in furtherance, and not in derogation, of the statutory policies. In contrast, no statutory policy is furthered by a minority union's insistence upon exclusive recognition. Indeed, such recognition would clearly abridge one of the most important rights guaranteed by Section 7.

The distinction which the Board has drawn achieves a balance between practices inimical to the organizational freedom of employees and the protection of legitimate competing interests which must be recognized in the collective bargaining relationship. Accordingly, properly viewed, the Board's interpretation

of Section 8(b)(1)(A) to proscribe minority picketing for recognition poses no threat to legitimate union activity.

D. Section 13, which insures against diminution of the right to strike except as "specifically provided for" in the Act, does not militate against the Board's construction of Section 8(b)(1)(A). The circumstance that the latter section does not expressly refer to strike conduct or picketing does not necessarily bring into play the immunity which Section 13 accords to strike action. Section 8(b)(1)(A), like each of the other unfair labor practice sections, is a specific provision, and if conduct may properly be found to be within the coverage of such a provision, prohibition thereof is "specifically provided for" within the meaning of Section 13 and therefore not immune. If minority picketing for recognition is within the reach of Section 8(b)(1)(A) independently of the impact of Section 13, the latter section does not remove the applicability of the former.

E. Finally, the regulation of recognition picketing contained in Section 8(b)(4)(B) and (C) does not exclude regulation of minority picketing for recognition under Section 8(b)(1)(A). The Board's construction of Section 8(b)(1)(A) leaves to Section 8(b)(4)(B) and (C) a fully independent scope, both in terms of coverage and remedy. First, the latter two provisions, unlike Section 8(b)(1)(A), reach recognition strikes even when the union in question represents a majority of the employees. Section 8(b)(1)(A) comes into play in a recognition context only where the recognition objective is pressed by a minor-

ity union. Second, there are differences in these provisions in terms of the remedy. Where a violation of Section 8(b)(4) is involved, Section 10(l) of the statute makes it mandatory that application be made to a district court for temporary injunctive relief. With respect to violations of Section 8(b)(1)(A), Section 10(j) of the statute vests the Board with discretionary authority to seek such relief in particular cases. In short, any duplication between Section 8(b)(4) (B) and (C) on the one hand and Section 8(b)(1)(A), on the other, is minimal in character and affords no substantial basis for ignoring the ordinary meaning which attaches to the words "restrain or coerce" in Section 8(b)(1)(A).

II

The Board believes that the new amendments to the Act, effective November 13, 1959, do not impair the validity of, or require any modification in, the order here. Section 8(b)(7), added by the new amendments, specifically proscribes picketing for recognition or organizational purposes in certain circumstances. In enacting the new provision, Congress did not specifically purport to resolve the question then pending in the courts of whether the Board already had power under Section 8(b)(1)(A) to regulate some aspects of that activity. Rather, it undertook to regulate the subject in a more detailed and comprehensive manner, and—in the Board's view—left Section 8(b)(1)(A) available, were the Board's interpretation ultimately sustained, as a sup-

plemental means of regulation. The Board finds support for this conclusion in the savings clause at the end of Section 8(b)(7), which provides that: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this Section 8(b)."

ARGUMENT

The instant case arose under the National Labor Relations Act, as amended in 1947. The basic question presented is whether Section 8(b)(1)(A) of that Act proscribes picketing by a minority union to gain recognition as the exclusive bargaining representative of the employees involved. As noted above, the Board has concluded that it does. Following the Board's decision and the ruling below, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86–257, 73 Stat. 519), which amends in various respects the National Labor Relations Act. Among those amendments is a provision dealing with recognition and organizational picketing. The Board is of the view that these supervening amendments do not affect the conclusions which it reached in the instant case under the provisions of the Act as amended in 1947, and that its order is entitled to enforcement if those views prevail. Accordingly, in this brief we deal first with the issues in the context of the 1947 Act (pp. 13–53, *infra*), and secondly with the impact of the 1959 amendments, if any, upon that issue (pp. 53–60, *infra*).

I. THE BOARD PROPERLY CONCLUDED THAT SECTION 8(B)(1)(A) OF THE ACT PROHIBITS PEACEFUL PICKETING BY A UNION WHICH DOES NOT REPRESENT A MAJORITY OF THE EMPLOYEES, TO COMPEL IMMEDIATE RECOGNITION AS THE EMPLOYEES' BARGAINING REPRESENTATIVE

INTRODUCTION

It is undisputed, and the facts set forth in the Statement (pp. 2–5, *supra*) show, that the Union continued to picket the premises of Curtis after it had been rejected by Curtis' employees in a Board-conducted election. Moreover, the facts show, and we do not understand the Union to contend otherwise in this Court, that an object of this post-election picketing was to compel Curtis to recognize it as the exclusive bargaining agent of its truck drivers and warehousemen even though it did not represent a majority of them.[2] The Union thus sought an objective which

[2] Thus, the Union admittedly sought a contract which entailed immediate recognition at the outset of the picketing in February 1954. It continued picketing through October 1955, after the Board election revealed that it lacked majority support, without taking any steps which would indicate a *bona fide* change in this objective. To be sure, when Curtis petitioned for a Board election in February 1955, the Union sent a letter to the Board's Regional Officer disclaiming any desire for current recognition and modified its picket signs to make it appear that it was only seeking to organize the employees (p. 4, *supra*). However, the Union did not communicate its alleged change of objective to the employer, made no attempt to couple the picketing with any of the conventional organizing techniques and, indeed, conducted the picketing at times when, and at an entrance where, the employees sought to be organized could not be reached (p. 5, *supra*). In these circumstances, the Board was warranted in concluding that the Union's disclaimer of recognition was merely a tactical maneuver designed to block a representation election, and that, after the election as before, it was in fact seeking immediate recognition as the

is contrary to one of the basic policies of the Act, and which Curtis could not lawfully grant. Section 1 declares that it is a policy of the Act to afford employees "full freedom" in the "designation of representatives of their own choosing." Section 7 implements this policy by specifically providing that employees shall have the right "to bargain collectively through representatives of their own choosing, * * * and shall also have the right to refrain from any or all such activities." To foist upon employees a bargaining representative unwanted by a majority of them clearly negates, contrary to the Act's policy, their Section 7 right to select their own representative, or to have no representative at all. Accordingly, it is well settled that an employer, who grants exclusive recognition to a union which lacks majority support, restrains and coerces his employees in violation of Section 8(a)(1) (see pp. 26–27, *infra*).

The question presented here is whether Congress left a union free to exert economic pressure on the employer and his employees, through peaceful picketing, to compel accession to an objective in derogation of the employees' Section 7 rights and the employer's obligations under the Act. In the Board's view, Congress did not leave this avenue open, but instead regulated picketing for such objective under Section 8(b)(1)(A). That Section makes it an unfair labor practice for a labor organization or its agents to "restrain or coerce * * * employees in the exercise of

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exclusive representative of Curtis' employees. See *National Labor Relations Board* v. *Knitgoods Workers' Union, Local 155*, 267 F. 2d 916, 919–920 (C.A. 2).

the rights guaranteed in section 7." It is the Board's position that picketing by a union to compel recognition even though it does not represent a majority of the employees restrains or coerces the employees in the exercise of their organizational rights, within the meaning of Section 8(b)(1)(A).

In arriving at this conclusion, the Board was mindful of the fact that the use of general language like "restrain or coerce" to regulate the economic weapons of labor organization entails the risk that wholly legitimate strikes and picketing will be swept under its ban.[3] However, it concluded that Congress, having decided that a curb on picketing and related activity by a minority or stranger union was required when such conduct was clearly inimical to the purposes of the Act, elected not to define the circumstances under which a union shall be regarded as having a minority or a stranger status and when its objectives reach the point of proscription (see pp. 33–40, *infra*). Instead, the Board believes that Congress resolved this problem, as it did in other portions of the Act and in the analogous Section 8(a)(1) in particular, by enacting general prohibitory language and leaving to the Board the task of applying it "in the light of the infinite combinations of events which might be charged as violative of its terms" (*Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798).

Discharging that function here, the Board has concluded that picketing by a union to compel recognition

[3] Indeed, it was on this basis that a provision similar to Section 8(b)(1)(A) was rejected when the Wagner Act was originally enacted. See S. Rep. No. 573, 74th Cong., 1st Sess., p. 16.

after it has been rejected by a majority of the employees can serve no purpose other than to restrain or coerce the employees in the exercise of their Section 7 rights, and must thus be held to be within the ban of Section 8(b)(1)(A). The Board's position has been accepted by the Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *United Rubber Workers* (*O'Sullivan Rubber Co.*), 269 F. 2d 694, petition for certiorari filed, No. 316, this Term.[4] The court below, however, rejected the Board's interpretation of Section 8(b)(1)(A), holding that "restrain or coerce," as used therein, does not encompass economic pressure of the type exerted by peaceful picketing, but only such coercive means as physical violence, mass picketing, and threats of direct economic reprisal. We shall show that the Board's conclusion that Section 8(b)(1)(A)

[4] That case involves furtherance of the recognition objective, not only by picketing, but by such other means as blacklisting the employer and appealing to customers to boycott his product. The Board's interpretation of Section 8(b)(1)(A) applies not only to picketing, but also to other economic sanctions utilized by a minority union to further a quest for recognition. See *International Association of Machinists* (*Alloy Mfg. Co.*), 119 NLRB 307, 309.

The Ninth Circuit likewise interpreted Section 8(b)(1)(A), as does the Board, in *Capital Service Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, 851–853, affirmed on other grounds, 347 U.S. 501. However, when the issue was presented to it again, in the *Alloy* case, which like *Rubber Workers* involved both picketing and boycotting in furtherance of a minority union's recognition objective, it sustained the Board's finding that the picketing was a violation of Section 8(b)(1)(A) on procedural grounds, but rejected the finding that the boycott appeals violated that provision. *National Labor Relations Board* v. *International Association of Machinists*, 263 F. 2d 796, union petition for certiorari pending, No. 57, this Term.

reaches the picketing here, which, as we have seen, effectuates the Act's policies, is: (1) permitted by the language of Section 8(b)(1)(A); (2) supported by the legislative history of that Section; and (3) otherwise reasonable. Finally, we shall show that the validity of the Board's interpretation of Section 8(b)(1)(A) is not impaired by the contrary arguments that have been advanced.

A. THE BOARD'S INTERPRETATION COMPORTS WITH THE ESTABLISHED MEANING OF THE TERMS "RESTRAIN OR COERCE," AS USED IN SECTION 8(B)(1)(A)

As this Court has recognized, peaceful picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 776 (concurring opinion). The "very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Hughes* v. *Superior Court*, 339 U.S. 460, 465. Indeed, as one informed commentator has observed, peaceful picketing is "a species of pressure or coercion and is intended as such by its users;" it is "a simple process of proscription," designed to impose an "embargo around the picketed premises". Gregory, *Labor and the Law* (Norton, 2d rev. ed., 1958), pp. 301–302.

Consistent with this accepted view as to the nature of peaceful picketing, the Board has described as follows the manner in which such picketing restrains or

coerces employees, when carried on for a purpose in derogation of their Section 7 rights (R. 18):

> * * * the pressure [exerted by picketing] is necessarily an economic one, a device to reduce the business to the point where his financial losses force [the employer] to capitulate to the union's demands. It is immaterial whether the ostensible technique, or the unspoken but necessary consequence is to cut off the employer's labor supply by preventing the employees from reporting to work; to keep the customers from buying his products; or to interrupt deliveries of supplies to the premises. The important fact of the situation is that the Union seeks to cause economic loss to the business during the period that the employer refuses to comply with the union's demands.
>
> And the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid. There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendment of the words "restrain or coerce" to direct application of pressure by the Respondent Union [upon] the employees. The dimunition of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests.

In short, in the Board's view, picketing for recognition by a minority union is designed to cause economic loss to the employer's business so long as he refuses to recognize the union. This circumstance, in turn, would tend to restrain or coerce the employees, for business loss to the employer jeopardizes the employees' economic status. They would thus be prompted to avoid the risk by foregoing their Section 7 rights and accepting the picketing union as their representative.

Reading "restrain or coerce" in Section 8(b)(1(A) in this way is consistent with the established meaning of those terms. There is no more effective and unequivocal way to restrain an employee than by causing a deprivation of his livelihood. Thus, action by the employer threatening or adversely affecting job tenure has long been regarded as the classic example of restraint and coercion of employees condemned under both Section 8(1) of the Wagner Act and Section 8(a)(1) of the Taft-Hartley Act. See, *e.g.*, *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 692–693; *National Labor Relations Board* v. *B.V.D.*, 237 F. 2d 545, 547 (C.A. D.C.); *National Labor Relations Board* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625 (C.A. 2).

Similarly, oral threats by union officials to employees, that refusal to support the union would result in job loss, have been held to constitute restraint and coercion on the part of the union, within the ban of Section 8(b)(1)(A). *E.g.*, *National Labor Relations Board* v. *Local 404, Teamsters*, 205 F. 2d 99,

101–102, n. 2 (C.A. 1); *National Labor Relations Board* v. *Local 55, Carpenters*, 205 F. 2d 515, 516 C.A. 10); *Lane* v. *National Labor Relations Board*, 186 F. 2d 671, 674 (C.A. 10).

Nor is it material that the union action may restrain or coerce employees only indirectly, *i.e.*, through its impact on the employer. As observed by the Court of Appeals for the Third Circuit: "Coercion once-removed is just as effective as if the union were to act upon the employee immediately." *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3). Indeed, since the employer controls employment, the union can ordinarily affect the employees' job tenure only through the medium of the employer. Accordingly, when a union—by means of an illegal union-security agreement or otherwise—causes the employer illegally to interfere with employment, the union's action, apart from any liability incurred by the employer, has been held to constitute restraint and coercion within the meaning of Section 8(b)(1)(A). See, *e.g.*, *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 837–938 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3); *National Labor Relations Board* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9); *National Labor Relations Board* v. *George D. Auchter Co.*, 209 F. 2d 273, 275–277 (C.A. 5). And in these situations, not even a showing of actual loss of employment has been required in order to establish restraint and coercion; the existence of a contract which improperly conditions employment upon forfeiture of a Section 7 right is sufficient.

See, *e.g.*, *National Labor Relations Board* v. *International Association of Machinists, Etc.*, 241 F. 2d 695, 696 (C.A. 9); *National Labor Relations Board* v. *Local 420, Etc.*, 239 F. 2d 327, 328–330 (C.A. 3); *National Labor Relations Board* v. *United Brotherhood of Carpenters, Etc., Local 517*, 230 F. 2d 256, 259 (C.A. 1); *Red Star Express* v. *National Relations Board*, 196 F. 2d 78, 81 (C.A. 2).

In sum, by reading "restrain or coerce" to cover economic sanctions, such as peaceful picketing, designed to damage a business and thereby "deprive * * * [employees] of the opportunity to work and be paid" (R. 18), the Board in this case, and the Fourth Circuit in *United Rubber Workers*, 269 F. 2d 694,[5] have simply applied the settled principle that this statutory language encompasses action adversely threatening employee job tenure.

The Board's reading of the words "restrain or coerce" in Section 8(b)(1)(A) to encompass picketing by a minority union, to compel recognition as the employees' representative, also comports with

[5] See also, *Capital Service, Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, 853 (C.A. 9) (n. 4, *supra*), and *National Labor Relations Board* v. *Knitgoods Workers' Union, Local 155*, 267 F. 2d 916, 920 (C.A. 2). Although the latter case involved picketing for recognition in the face of an outstanding certification (Section 8(b)(4)(C)), the court's characterization of the effect of the picketing is equally valid here (267 F. 2d at 920):

> Viewed realistically * * * it brought pressure upon the employees, not by the legitimate arts of persuasion but by making them fear the disappearance of their jobs, to strike and thus lend their weight also to punitive economic pressures against the employers. Such tactics are sharply at variance with the Congressional policy of allowing employees freedom to decide which union, if any, they will join, see § 7 of the Labor Relations Act * * *.

the interpretation given to comparable language in state laws. Thus, in *Building Service Employees* v. *Gazzam,* 339 U.S. 532, this Court sustained the finding of a state court that peaceful picketing was designed to coerce the employees' choice of representatives, contrary to state policy, upon a showing that the picketing had ensued and the employer was placed on a "We Do Not Patronize" list after he had rejected a demand for a union-shop contract and a majority of the employees had voted against joining the union. Similarly, in *Teamsters* v. *Vogt,* 354 U.S. 284, the Court sustained a state court injunction against peaceful picketing by a minority union, on the ground that, because of the economic pressure which the picketing exerted on the employer's business, the state court was warranted in inferring that the ultimate purpose of the picketing was to coerce employees in the exercise of their organizational rights, contrary to state policy. Indeed, in so holding, the Court observed: "For a declaration of similar congressional policy, see § 8 of the National Labor Relations Act" (354 U.S. at 294). Section 8 can be said to reflect the policy of freeing employees from the pressure of the threatened loss of employment caused by union sanctions, exerted under the circumstances existing in *Vogt,* only if the "restrain or coerce" language used in subsection (b)(1)(A) is read as encompassing such sanctions. See also, *Pappas* v. *Stacey,* 151 Me. 36, 116 A. 2d 497, appeal dismissed, 350 U.S. 870.

B. THE BOARD'S INTERPRETATION IS SUPPORTED BY THE LEGISLATIVE HISTORY OF SECTION 8(B)(1)(A)

Section 8(b)(1)(A) was originally proposed on the floor of the Senate as an amendment to the reported committee bill, and was thereafter passed by the Senate and adopted by the House-Senate Conference.

Its introduction occurred against the following background: (1) The hearings before the House and Senate Labor Committees had extensively inquired into the practice of using picketing and other economic sanctions to further union recognition or organization objectives.[6] (2) The House decided to enact a broad ban against such activities. Thus, Section 12(a)(2) of the House Bill proscribed as "unlawful concerted activities" the picketing of "an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer." Similarly, Section 12(a)(3)(C) proscribed "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 * * *, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer

[6] See, *e.g.*, *Hearings before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., on S. 55 and S.J. 22, pp. 15, 61–63, 130–131, 936, 1497, 1694, 1938. See also *Hearings before the House Committee on Education and Labor*, 80th Cong., 1st Sess., on bills to amend and repeal the National Labor Relations Act, pp. 992–994, 999–1004, 1097–1098.

to violate any law * * *'" (1 Leg. Hist. 205–206),[7] and a provision was added to Section 7, giving employees "the right to refrain" from union or organizational activity. *Id.*, at 176. (3) The bill reported out by the Senate Labor Committee, however, was narrower. Section 8(b)(4)(3) (subsequently renumbered 8(b)(4)(C)) proscribed picketing for recognition and related conduct directed against the primary employer, where "another labor organization has been certified as the representative" of his employees. And Section 8(b)(4)(2) (subsequently renumbered 8(b)(4)(B)) proscribed efforts to compel recognition through secondary pressures. I Leg. Hist. 113.[8] As emphasized in the Report accompanying the Senate Bill (S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, I Leg. Hist. 428): "It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed."[9]

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[7] "Leg. Hist." refers to the two volume legislative history of the Labor Management Relations Act, 1947 (G.P.O., 1948).

[8] These provisions made it an unfair labor practice for a labor organization or its agents to strike or induce employees to stop work: "(2) for the purpose of forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act; (3) for the purpose of forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act."

[9] But, the Senate bill also contained Section 8(b)(2) (I Leg. Hist. 112), discussed pp. 41–42, *infra*. Thus, if the recognition demand were coupled with a demand for a union shop, there

In a supplement to the Senate Report, five members of the Senate Labor Committee, including Senators Taft and Ball, expressed the view that the Senate Bill as reported had not gone far enough in its regulation of union activity, particularly in failing to accord protection against union restraints imposed in the course of organizing drives. Consequently, they announced their intention to introduce Section 8(b)(1)(A) as an amendment on the floor. Respecting this provision, whose language was copied from Section 8(1) of the Wagner Act which proscribed employer restraints on employee organizational rights, they stated that they could "see no reason whatever why [unions] should not be subject to the same rules as the employers." S. Rep. No. 105, 80th Cong., 1st Sess., p. 50 (Supp. Views), I Leg. Hist. 456. In short, the major purpose which the sponsors of Section 8(b)(1)(A) sought to achieve was to impose on unions, insofar as possible, the same restrictions already imposed on employers respecting intrusion upon protected employee activity.

The same point was repeatedly made during the floor debate on Section 8(b)(1)(A), with emphasis given to the fact that the scope of this Section was to be measured by the many decisions, to the extent applicable, which had established the scope of Section 8(1) of the Wagner Act. Thus, Senator Ball stated that "individual employees in the free exercise of their rights guaranteed by this act are just as much entitled to protection from [coercive] activities of unions

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would be an attempt to cause discrimination and the conduct would be reachable under Section 8(b)(2).

as they are from the same kind of coercive activities on the part of the employers" (93 Cong. Rec. 4432, II Leg. Hist. 1199). Senator Taft pointed out that "All that is attempted is to apply the same provision [Section 8(a)(1)] with exact equality to labor unions" (93 Cong. Rec. 4436, II Leg. Hist. 1207). And Senator Smith explained that Section 8(b)(1)(A) was offered "in order to make it balance with exactly the same provision in section 8(a), which prevents an employer from interfering with or restraining employees in the exercise of their rights"; that it was "designed to protect employees in their freedom to decide whether or not they desire to join labor organizations" (93 Cong. Rec. 4435, II Leg. Hist. 1204). See, also, 93 Cong. Rec. 4016, 4017, 4025, 4434, 4435, 4436, 4437; II Leg. Hist. 1018, 1021, 1032, 1203, 1205, 1206, 1209.

The Board's conclusion that picketing by a minority union to compel recognition is within Section 8(b)(1)(A) achieves the intended even-handed application of that Section and Section 8(a)(1). As shown pp. 17–22, *supra*, such picketing jeopardizes the employees' economic status, and job threats are a well recognized form of restraint banned by Section 8(a)(1). Moreover, it is settled that an employer violates Section 8(a)(1) of the Act—as well as Section 8(a)(2)—by according exclusive recognition to a minority union.[10] The Union's conduct in this case

[10] See, *e.g.*, *Dixie Bedding Manufacturing Co.* v. *National Labor Relations Board*, 268 F. 2d 901 (C.A. 5); *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565, 569 (C.A. 4); *National Labor Relations Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 922, 924 (C.A. 9); cf. *National Labor*

is the counterpart of such employer action, for its objective is the deprivation of the same employee right, *i.e.*, the right to make a free choice with respect to representation. Accordingly, if Section 8(b)(1)(A) is to be given its intended equivalent meaning, it should reach the imposition by a minority union of economic sanctions to achieve exclusive recognition, just as Section 8(a)(1) reaches recognition of a minority union by an employer.

This analysis is confirmed by other portions of the legislative history of Section 8(b)(1)(A). Section 8(b)(1)(A) was extensively debated, and a number of examples of its application were suggested by its sponsors. Particular emphasis was given to the prohibition of union conduct which was improper irrespective of the legitimacy of its ultimate objective—*e.g.*, mass picketing, violence, threats of direct economic reprisal. See 93 Cong. Rec. 4021, 4435–4436; II Leg. Hist. 1025, 1205–1206.[11] These examples, how-

Relations Board v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267. The Board has also held that the minority union itself violates Section 8(b)(1)(A) by entering into and maintaining a contract which accords it exclusive recognition. See *Bernhard-Altmann Texas Corp.* 122 NLRB No. 142.

[11] This emphasis prompted the Board, early in the administration of the amended Act, to take the view that the reach of Section 8(b)(1)(A) was restricted to such improper tactics, and did not necessarily cover peaceful tactics, even though they might have a coercive impact on employees, to obtain illegal objectives. See, especially, *National Maritime Union*, 78 NLRB 971, 982–987; *Perry Norvell Co.* 80 NLRB 225, 238–241. As the Board pointed out in its decision herein, however, these cases did not squarely present the question of whether a minority union's economic sanctions against an employer to obtain exclusive recognition fell within Section 8(b)(1)(A). Thus,

ever, were not intended to exhaust the scope of Section 8(b)(1)(A). As fully described by the Board in its decision herein (R. 27–28), Senator Taft, one of the sponsors of Section 8(b)(1)(A), cited two instances intended to be reached by that provision which involved, as does the present case, peaceful strikes and picketing for the improper purpose of obtaining representation rights by an unwanted union.

Thus, Senator Taft pointed out that the "amendment protects men who may not be members of unions at all. In fact, many of the cases of coercion are * * * cases in which a union which is attempting to organize sends its representatives to the plant and coerces the employees to join that union." To illustrate, he referred to the *Hall Freight Lines* case, 65 NLRB 397, which was characterized as a situation where a union representing the dock employees called a strike to compel the trucking employees, represented by another union, to join the first union. Moreover, when Senator Pepper commented that there was no threat of physical harm in this situation, Senator Taft added: "The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat and that is coercion—something which they had no right to do"

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as far as the Board was concerned in deciding this case, they were at best only "dubious precedent" (R. 32). When squarely confronted with the question in this case, the Board thoroughly reexamined the legislative history of Section 8(b)(1)(A), and concluded that the considerations advanced in the text herein precluded adoption in this case of the views expressed in the *National Maritime Union* and *Perry Norvell* cases, "to the extent [they] seem contrary to the results reached here" (R. 32).

(93 Cong. Rec. 4023, II Leg. Hist. 1029). Shortly thereafter, Senator Taft again emphasized "That the men who are coerced may not have anything to do with the union at all", and he cited the case where: A "union went to a plant in California and said, 'We want to organize your employees. Call them in and tell them to join our union.' The employer said, 'We have not any control over our employees. We cannot tell them, under the National Labor Relations Act.' They said, 'If you don't we will picket your plant', and they did picket it, and closed it down for a couple of months" (93 Cong. Rec. 4024, II Leg. Hist. 1030). He concluded with the statement: "There are plenty of methods of coercion short of actual physical violence" (93 Cong. Rec. 4024, II Leg. Hist. 1031).

Likewise, Senator Ball, another sponsor of Section 8(b)(1)(A), illustrated the coverage of the Section by reference to similar acts of union coercion. He gave three examples of the type of activity at which the section was aimed. One covered physicial violence. Another, a threat to double initiation fees. And the third, a case where "Teamsters Local No. 886" had been "picketing an establishment although no members of the union were employed there, in an effort to coerce those who were employed there into joining a union which they did not want to join" (93 Cong. Rec. 4017, II Leg. Hist. 1019–1020).

Nor is the force of these illustrations diminished by the subsequent action which occurred before Section 8(b)(1)(A) was adopted by the Senate. Thus, when the provision was originally introduced it made

it unlawful for a union "to interfere with, restrain or coerce * * * employees," but the word "interfere" was deleted before passage. The word "interfere" was eliminated in response to Senator Ives' fear that otherwise "any conversation, and persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice" (93 Cong. Rec. 4270, II Leg. Hist. 1138; see also, *id.* at 4435, 1205). The deletion of this phrase therefore hardly would sanction economic coercion of the type involved here. This is confirmed by the circumstance that both Senators Taft and Ball readily agreed to delete "interfere." Senator Taft stated that such change "would not make any substantial change in the meaning" of Section 8(b)(1)(A) (93 Cong. Rec. 4270–4271, II Leg. Hist. 1138–1139), and Senator Ball observed that the intended parallel meaning of this provision with Section 8(a)(1) would not be affected since employer violations had generally been reached under the "restrain and coerce" language rather than under the prohibition against interference (*ibid.*)

Furthermore, toward the end of the debates on Section 8(b)(1)(A), Senator Taft, in response to the fear expressed by Senator Morse that the provision would slow up organizing drives, assured that it would not "outlaw strikes * * * [nor] prevent anyone using the strike in a *legitimate way,* conducting peaceful picketing, or employing persuasion" (93 Cong. Rec. 4436, II Leg. Hist. 1207; emphasis added). In the light of Senator Taft's earlier illustration of circumstances, such as those here, where picketing was

used to restrain employees in the exercise of their organizational rights, it is hardly likely that this generalized remark was intended as a nullification of the illustrations previously given. Rather, the more reasonable interpretation is that Senator Taft was referring only to strikes or picketing for lawful objectives, such as a strike for recognition by a union which represented a majority of the employees. This reading is buttressed by the fact that he referred to using the strike "in a legitimate way," and Senator Morse, in expressing the fear that Section 8(b)(1)(A) would outlaw "organizational strikes and strikes for recognition", had asserted that "it could easily be construed to prohibit all types of strikes in situations where *some* of the employees are opposed to the strike" (93 Cong. Rec. 4431, II Leg. Hist. 1197; emphasis added). Moreover, after Senator Morse's remarks, Senator Taft and other proponents of Section 8(b)(1)(A) did not waver from their view that its basic purpose was to subject unions, insofar as possible, to the same restrictions as those imposed on employers by Section 8(a)(1) (pp. 25–26, *supra*), and, as we have shown, encompassing picketing by a minority union to compel recognition within Section 8(b)(1)(A) would effectuate this purpose.

In sum, there is a reasonable basis for concluding, as did the Board, that, in adopting Section 8(b)(1)(A) on the floor, the Senate intended to enlarge upon the provisions of the Senate bill, insofar as picketing by a union which represented none or a minority of the employees was concerned, and to proscribe such picketing and related conduct where, as here, it

worked economic coercion on employees to achieve objectives in derogation of their Section 7 rights. That is, Section 8(b)(1)(A) was designed, at least in part, to bring into the Senate bill some of the features of Section 12(a) of the House bill (p. 23, *supra*).

This is substantiated by the action of the House-Senate Conference Committee. The Committee agreed to accept Section 8(b)(1)(A) of the Senate bill in place of Section 12(a) of the House bill, but coupled this with acceptance of the House bill's amendment to Section 7, specifically giving employees the right to refrain from organizational and union activity if they so desired. The Managers on the Part of the House explained the compromise on the ground that the amendment to Section 7, taken in conjunction with Section 8(b)(1)(A), covered much of the ground of Section 12(a). H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 39–40, 42, 58–59, I Leg. Hist. 543–544, 546, 562–563. See also, 93 Cong. Rec. 6443, II Leg. Hist. 1539, where Senator Taft gave substantially the same explanation to the Senate. And see *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 260, n. 15.[12]

[12] The foregoing analysis is not affected by the statement in the Conference Report that "the primary strike for recognition (without a Board certification) was not prohibited." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43, I Leg. Hist. 547. Since this is a repetition of the identical language contained in the Senate Report (p. 24, *supra*), which was written before Section 8(b)(1)(A) was added, it is likely that it was automatically carried over to the Conference Report without any thought given to the intervening impact of Section 8(b)(1)(A). In any event, this statement was made in describing Section 8(b)(4)(B), which prohibits secondary strike pres-

C. THE BOARD'S INTERPRETATION HAS REASONABLE LIMITS, AND THUS WOULD NOT INTERDICT LEGITIMATE UNION ACTIVITY AS WELL.

To read "restrain or coerce" in Section 8(b)(1)(A) as encompassing economic pressure on the employer which affects the employees' livelihood does not subject to the ban of that section many forms of legitimate union activity. Thus, it may be urged that such interpretation would include a majority union's strike for recognition or for contract concessions, for such union conduct may well hurt the employer's business and thereby lessen employment opportunities for the minority of the employees who do not support the union. Yet, it is clear that Congress did not desire activity of this kind to be interdicted by Section 8(b)(1)(A) (see pp. 30–31, *supra*).

This contention overlooks the fact that in these situations, unlike where a minority union exerts pressure to compel exclusive recognition, there is no Section 7 right which is infringed, and therefore an essential ingredient for a violation of Section 8(b)(1)(A) is lacking. Section 9 of the Act makes the union designated by a majority of the employees in the bargaining unit "the exclusive representative * * * of all the employees," and Sections 8(a)(5) and 8(b)(3) impose on both union and employer the obligation, upon request, to enter into a collective bargaining relationship. And, to permit the majority representative to use economic sanctions in support of its recognition

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sures to compel recognition even by a majority union. In this context, it was necessary to make clear that such a majority union remained free to compel recognition by striking the primary employer himself, and the reassuring statement just quoted serves that purpose.

or contract demands, furthers these statutory policies. See *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 298 (concurring opinion). In these circumstances, the Section 7 right to refrain from union activity gives way to the principle of majority rule.

On the other hand, no statutory policy is furthered by the insistence that an employer recognize and bargain with a union which does not represent a majority of his employees. Such recognition would clearly abridge a Section 7 right, subverting the very foundation of all legitimate collective bargaining—a freely chosen majority representative. Indeed, where, as here, the employees have just rejected the union "in a fair election conducted by the Board," the frustration of the act's purposes is "the more glaring" (*United Rubber Workers*, 269 F. 2d at 698).[13] Moreover, accession to the union's demands would cause the employer to commit an unfair labor practice (see pp. 26–27, *supra*). Accordingly, in the situation here, it is appropriate to

[13] To permit economic coercion to be exerted in these circumstances, subverts not only Section 7, but also the policy of Section 9(c)(3) of the Act, which precludes the Board from directing more than one election in a bargaining unit during a twelve-month period. Section 9(c)(3) was intended "to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot * * *" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 12, I Leg. Hist. 418). Where, as here, the employees have just repudiated the union in a Board election, and there is no indication that the union thereafter has been able to change the employees' minds and acquire majority support (cf. *Ekco Products Co.*, 117 NLRB 137, 138), the employees' choice is rendered meaningless if the union could nevertheless force the employer to recognize it as the exclusive bargaining representative.

give effect to the otherwise applicable reach of Section 8(b)(1)(A).

In short, as with the same phraseology in Section 8(a)(1), the terms "restrain or coerce" in Section 8(b)(1)(A) must be read so as to achieve a balance between practices inimical to the organizational freedom of employees and the protection of legitimate competing interests which must be recognized in the collective bargaining relationship. Under Section 8(a)(1), for example, employers have been permitted to replace economic strikers, even though such action exerts, in a literal sense at least, considerable restraint upon the exercise of the right to strike. *National Labor Relations Board* v. *Mackay,* 304 U.S. 333, 345. The propriety of the competing interest of an employer in continuing his business is thus given recognition. However, where an employer responds to strike action by taking steps beyond those which are appropriate to the protection of that interest, *i.e.*, where he discharges the strikers, there is no reason for not applying the "restrain or coerce" language of Section 8(a)(1) to his action. See, *e.g., National Labor Relations Board* v. *Buzza-Cardozo,* 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923. A similar "determination of the proper adjustments" between opposing interests is made in the application of Section 8(a)(1) to situations where employers establish limitations on organizational activities on company time and property. See *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112; *National Labor Relations Board* v. *United*

Steelworkers, 357 U.S. 357; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798. As summarized by this Court, "the ultimate problem is the balancing of the conflicting legitimate interests." *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96.[14]

Similarly, Section 8(b)(1)(A), in reaching union restraint and coercion, is not unqualified. Where such restraint can be justified as necessary to the protection of a competing interest which the Act recognizes, an accommodation between the interests is required which may privilege the restraint. But, where, as here, no legitimate competing interest is present, the Section can be given unqualified effect.

Congress adopted this method of regulating picketing and related conduct by a minority or stranger union, in an organization or recognition context, because of the fine line which exists between the licit and the illicit in this area. It is easy to label a union as a stranger or a minority union when it has never represented the employees in question.[15] But, suppose, as here, the union originally represented a majority of the employees and thereafter loses that majority; how much time must elapse before such a union may

[14] Compare the observation of Mr. Justice Holmes, speaking for the Court in *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

[15] This is the situation in *National Labor Relations Board* v. *International Association of Machinists*, 263 F. 2d 796 (C.A. 9), union petition for certiorari pending, No. 57, this Term.

appropriately be viewed as a "stranger"? Similarly, where, as here, the union's objective is exclusive recognition without regard to majority status, it is clear that the purpose sought is in derogation of the employees' Section 7 rights. But, suppose the union asserts that its objective is merely to organize the employees, with a view to demanding recognition in the future should majority support be acquired; or that its objective is neither recognition nor organization, but merely an effort to protest non-union conditions which threaten its gains in the organized portion of the industry. The question of whether these other objectives are only a subterfuge for an immediate recognition objective, and, if not, the extent to which economic pressure in support thereof should be privileged, are delicate issues which require evaluation on a case-by-case basis.[16]

[16] Thus, as the Board noted herein, respecting minority picketing for organizational purposes (R. 22): "In words, at least, such conduct falls within * * * the Act. More important, organizational picketing is not tainted, on its face, with the unlawful direct purpose of forcing the commission of an unfair labor practice by the employer and the summary imposition of an unwanted union upon its employees." Hence, although minority picketing for organizational purposes likewise exerts a coercive force upon the employees who prefer to work, there is, unlike in the case of minority picketing for immediate recognition, another legitimate interest, *i.e.*, the right to engage in self-organization, to be balanced, and it may result in privileging the coercion. Accordingly, the Board, here and in subsequent cases (see *Retail Store Employees Union, Local 1595 (J. C. Penney Co.)*, 120 NLRB 1535, 1536, n. 4), has specifically reserved the question of whether minority picketing for organizational purposes would be violative of Section 8(b)(1)(A). And see *Radio Broadcast Technicians (WKRG-TV)*, 123 NLRB No. 55 (April 1, 1959), where the Board sustained the

Instead of working out these problems itself, Congress, at the time of the 1947 amendments to the Act, adopted the course of enacting only general prohibitory language and leaving to the Board the task of giving it specificity (see *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798, p. 15, *supra*). The way in which the Board has performed that task may be illustrated by a further examination of the situation here. Thus, the Union was the certified majority representative of Curtis' employees when it originally struck the Company in support of its contract demands. A Board certification immunizes a union's representative status from challenge on the ground of a loss of majority for a reasonable period, usually a year. *Brooks* v. *National Labor Relations Board,* 348 U.S. 96. During that period, even in the face of a strike in which, as in this case, a majority of the original employees are permanently replaced, the employer is required to treat with the certified representative. And, under Section 9(c)(3), no election may be conducted during a twelve-month period following the initial balloting, for the purpose of unseating an incumbent representative. The foregoing principles would militate against treating the Union as a minority or stranger union during this period when its certification remained vital, irrespective of whether, through replacement of strikers, its majority support had in fact been dissipated. Accordingly, the Board found no

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Trial Examiner's dismissal of a Section 8(b)(1)(A) complaint, predicated on the finding that, on the facts of that case, the union's object was not recognition but merely the protection of its bargaining position with competing unionized stations.

violation of Section 8(b)(1)(A) respecting the Union's picketing from February 1954, when the strike began, until October 1955, when the Union was decertified in a Board election.

After that point, however, the balance changed. When the certification year has passed and Section 9(c)(3) no longer bars an election, the overall policies of the Act may ordinarily best be served by permitting, upon proper application, a redetermination of the employees' desires concerning representation, regardless of whether the employer and union are locked in an unresolved economic struggle. Otherwise, the employees, who are entitled under the Act to be represented by a union of their choice, would be prevented from extricating themselves from a situation where a representative they no longer support continues indefinitely to perpetuate unrest and conflict in their name, as their legally designated representative. Hence, after the strike and the picketing had gone on for about 19 months, it was clearly appropriate to hold a new election and give the present complement of employees, who had validly and permanently replaced the strikers and thus were the only ones entitled to have a voice in the designation of a representative,[17] an opportunity to make their wishes known. And, when the results of that election showed

[17] Section 9(c)(3) of the act, as it read prior to the recent amendments, provided that employees "on strike who are not entitled to reinstatement shall not be eligible to vote" in a Board election. Under the amendments, however, such employees are now eligible to vote under certain circumstances. See Sec. 702 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 542, Pub. Law 86-257.

that these employees overwhelmingly rejected the Union, their rights required vindication. It was, therefore, reasonable for the Board to conclude, as it did, that, after the election, the Union was relegated to the status of a minority or stranger union, and any continued efforts on its part to compel recognition were within the ban of Section 8(b)(1)(A).

In sum, the general provisions of Section 8(b)(1)(A), as applied to picketing and related activity by a minority or stranger union, are not without limit. They are a reasonable means of regulating this complex subject, enabling the Board to balance the conflicting interests which are present in each case, and to make the refinements which are called for by varying factual situations.

D. THE ARGUMENTS ADVANCED TO THE CONTRARY DO NOT MILITATE AGAINST THE BOARD'S INTERPRETATION

The court below, in concluding that Section 8(b)(1)(A) should not be construed to cover peaceful picketing for recognition by a minority union, indicated that its conclusion was "necessitated" by Sections 13 and 8(b)(4)(C) of the Act, and was "confirmed" by both legislative history and post legislative history (R. 185–186). We show below that neither these nor the other contentions which have been advanced against the Board's reading of Section 8(b)(1)(A) are meritorious.

1. The contention that Section 13 of the Act immunizes the picketing in this case

Section 13 of the Act provides: "Nothing in this Act, except as specifically provided for herein, shall be

construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The court below concluded that "if Section 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, Section 13, which prohibits interference with the right to strike except as specifically provided for elsewhere in the Act, would effectively be expunged therefrom" (R. 185).[18] This contention presupposes that an unfair labor practice provision of the Act, to escape the limitations of Section 13, must expressly refer to strike conduct. But this premise is demonstrably erroneous. Thus, Section 8(b)(2) does not expressly prohibit strikes, and yet strikes to compel a discharge by an employer, in violation of Section 8(a)(3) of the Act,

[18] Section 13 refers in terms only to a strike, and not to picketing or related economic sanctions. However, in *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, this Court relied on Section 13 to support its holding that Section 8(b)(4)(A) and (B), the Act's secondary boycott provisions, should not be read to encompass picketing of the primary employer's plant for the purpose of securing recognition (*id.*, at 673). Although this shows that the term "strike," as used in Section 13, may include picketing, it does not tell us when another provision of the Act may be deemed to have removed picketing from the protection of that Section. The Court had no occasion in that case to decide the applicability of Section 8(b)(1)(A) to the union conduct involved. Indeed, it specifically noted that, insofar as the picketing there was alleged to be coercive, "the complaint more properly [should] have relied upon Section 8(b)(1)(A)" (341 U.S. at 672). See also, *National Labor Relations Board* v. *United Rubber Workers*, 269 F. 2d 694, 699 (C.A. 4), union petition for certiorari pending, this Term.

have never been deemed to fall within the protective cloak of Section 13, but are instead violations of Section 8(b)(2) of the Act. See, *e.g.*, *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392 (C.A.D.C.), certiorari denied, 340 U.S. 934; *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 688–689 (C.A. 2), certiorari denied, 338 U.S. 954; *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782, 802–804 (C.A. 7), certiorari denied on this point, 344 U.S. 812. Similarly, picketing by a minority union to secure a contract compelling union membership as a condition of employment has been held to constitute an attempt to cause illegal discrimination within the meaning of that section. See *Denver Bldg. Trades Council*, 90 NLRB 1768, enforced, 192 F. 2d 577 (C.A. 10); *Medford Bldg. Trades Council*, 96 NLRB 165; cf. *Garner* v. *Teamsters Union*, 346 U.S. 485. Moreover, it is plain, as the court below concedes, that Section 8(b)(1)(A) outlaws violent strikes and picketing, although that section does not contain the terms "strikes" or "picketing." The short of the matter is that Section 8(b)(1)(A), like each of the other unfair labor practice sections, is a specific provision, and, if conduct may properly be found to be within the coverage of such a provision, prohibition thereof is "specifically provided for" within the meaning of Section 13 and therefore not immune. See *Truck Drivers Union, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512, 515 (C.A.D.C.), certiorari denied, 355 U.S. 958.

The correctness of this reading of Section 13 is confirmed by the established meaning of that provision

under the Wagner Act, and the clear evidence that Congress did not intend to change that meaning by the 1947 amendments. Thus, the language of Section 13 under the Wagner Act was even more sweeping in its restriction against interference with strikes than the present language. It then read: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike". The limiting phrase, "exeept as specifically provided for herein," and the concluding clause, "or to affect the limitations or qualifications on that right," were added in 1947. It was settled law under the Wagner Act, however, that employees who engaged in a strike for improper objectives were not protected by Section 13 against discharge or other penalties. That is, Section 13's protection against interference with the right to strike did not in any event extend to strikes for objectives which were in conflict with the policies of the Act. Indeed, such was the holding in *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4), which involved the same kind of illegal objeetive as that presented in the instant case—recognition by an employer of a minority group. As the court pointed out, in sustaining the employer's right to discharge for such activity, economic action to force collective bargaining with a minority representative is contrary to the "purpose of the act * * * to give to the employees as a whole, through action of a majority, the right to bargain with the employer," and therefore cannot be regarded as protected by either Sections 7 or 13 (145 F. 2d at 203, 205).

No change in this holding was effected by the 1947 amendments. As explained in the Senate Report with respect to Section 13 as it was ultimately enacted (S. Rep. 105, 80th Cong., 1st Sess., p. 28, I Leg. Hist. 434):

> It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 NLRB 1302, and *Thompson Products*, 72 NLRB 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal law (*Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp.* v. *N.L.R.B.*, 306 U.S. 240).
>
> This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions.

Similarly, the House Conference Report emphasized that Section 13 "recogniz[ed] that the right to strike is not an unlimited and unqualified right." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59, I Leg. Hist. 563.

In sum, Congress explicitly approved the decisions which had refused to immunize union conduct which, although peaceful, had objectives inimical to the purposes of that Act.[19] The amendment to Section 13

[19] This approval was also evidenced in the amendment to Section 7, granting employees "the right to refrain" from the organizational and concerted activities protected by that Section (pp. 24, 32, *supra*). This amendment, according to Senator Taft, "demonstrates a clear intention that these undesirable concerted activities [conduct in support of improper objec-

both recognized that such conduct should not be regarded as protected, by providing that nothing in the Act should "affect the limitations or qualifications on [the] * * * right [to strike]," and allowed for the coverage of such conduct under the subsections of Section 8(b), by providing exceptions to the protection of Section 13, "as specifically provided for herein." See the discussion on this point in *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 258–265. Accordingly, if, as we have shown, minority picketing for recognition may be regarded as within the reach of Section 8(b)(1)(A) independently of the impact of Section 13, the latter section does not remove the applicability of the former.

2. The contention that the regulation of recognition picketing contained in Section 8(b)(4)(C) precludes coverage of the same subject matter by Section 8(b)(1)(A)

The court below further states (R. 18) that, "since Section 8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of Section 8(b)(1)(A) would make the former section entirely redundant." It may also be noted that Section 8(b)(4)(B) also expressly covers recognition picketing in the context of a secondary boycott, *i.e.*, it proscribes inducement of strikes on the part of neutral employees for the purpose of putting pressure on

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tives] are not to have any protection under the act * * *." 93 Cong. Rec. 6443, II Leg. Hist. 1539. See also H. Rep. No. 245, 80th Cong., 1st Sess., pp. 26–28, I Leg. Hist. 317–319; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38–40, I Leg. Hist. 542–544.

another employer to grant recognition, unless the union seeking recognition has been certified by the Board (see pp. 24, 32, n. 12, *supra*).

As the Fourth Circuit pointed out in *United Rubber Workers*, 269 F. 2d 694, 699–700:

> We do not think that this argument justifies the robbing of § 8(b)(1)(A) of the meaning to which its terms entitle it. The circumstances under which this section was inserted in the Act support the view that it should be given a broad interpretation in order to protect employees from coercive conduct not only of the employer but also of labor organizations. When the statute was first reported out of committee in the Senate it contained § 8(b)(4)(B) and (C) but did not contain § 8(b)(1)(A). Five members of the committee, including Senators Taft and Ball, were of the opinion that the bill was not stringent enough to regulate certain union activities and accordingly sought amendments on the floor which resulted in the addition of the last named section. Hence it may fairly be recognized as an enlargement of the bill originally reported so as to make provision for circumstances not covered by § 8(b)(4)(B) and (C) as originally incorporated therein. * * *

See also, pp. 25–32, *supra*.

Moreover, a careful reading of these interrelated provisions will show that the Board's construction of Section 8(b)(1)(A) leaves both to Sections 8(b)(4)(B) and 8(b)(4)(C) a fully independent scope, both in terms of coverage and remedy. As for coverage, the latter two provisions, unlike Section 8(b)(1)(A), reach recognition strikes even when the union in

question represents a majority of the employees whom it seeks to represent. See *Paint, Varnish & Lacquer Makers Union (Andrew Brown Co.)*, 120 NLRB 1425, 1428, n. 5. Thus, in the two restricted situations covered by Section 8(b)(4)(B) and (C), Congress determined that no strike action should be permitted (subject to the exception explicitly stated in Section 8(b)(4)(B)), regardless of the majority status of the union. The desirability of protecting the neutral employer against employee pressure was deemed to outweigh the interest of a majority union in striking in the situation covered by Section 8(b)(4)(B).[20] Similarly, in the situation covered by Section 8(b)(4)(C), the respect which should be accorded a certification, until revoked, was considered to outweigh a rival union's interest in striking, even though it may have succeeded in winning a majority of the employees away from the certified union.[21] It may be noted that majority strikes in the latter situation are not an infrequent occurrence, particularly where an outstanding certification has been in effect a long period of time. See, *e.g., Warehouse Union, Teamsters Local 688 (Coca Coca Co.)*, 116 NLRB 923; *International Brotherhood of Teamsters, Etc. (Ready Mixed Concrete Co.)*, 117 NLRB 1266; *Local No. 224, International Union, Allied*

[20] Cf. *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93.

[21] See *Parks* v. *Atlanta Printing Pressmen*, 243 F. 2d 284 (C.A. 5), certiorari denied, 354 U.S. 937; *Tungsten Mining Corp.* v. *District 50*, 242 F. 2d 84 (C.A. 4), certiorari denied, 355 U.S. 821; *Lewis Food Co.* v. *Meat Drivers Union*, 159 F. Supp. 763, 766–767 (S.D. Calif.); *McLeod* v. *National Maritime Union*, 157 F. Supp. 691, 694–695 (S.D. N.Y.). Cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 103–104.

Industrial Workers (Queen Ribbon Co.), 116 NLRB 890.

Under the Board's interpretation, however, Section 8(b)(1)(A) comes into play in a recognition context where the recognition objective is pressed by a minority union. There is, of course, some overlapping of these provisions, since Sections 8(b)(4)(B) and 8(b)(4)(C) are applicable to strikes for recognition by a minority union, as well as a majority union.[22] But for that matter, there is also an indisputable degree of overlapping between Sections 8(b)(4)(B) and 8(b)(4)(C) where a strike in opposition to an existing certification occurs in a secondary boycott situation. Such minimal duplications in as complex a statute as the Labor Management Relations Act are scarcely grounds for overturning the ordinary meaning of the statutory language. Moreover, in particularizing in some of the later subsections of 8(b) conduct that is also covered by the more general language of 8(b)(1)(A), Congress was only following the established pattern of draftsmanship employed in Section 8(a), where subsequent subsections deal with specific forms of employer restraint and coercion prohibited in Section 8(a)(1). See, *e.g., National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S.

[22] However, these sections would proscribe a recognition demand by a minority union only where it was furthered by strikes or the inducement thereof. Section 8(b)(1)(A), as read by the Board would, on the other hand, cover attaining the recognition objective by other means as well, such as oral appeals to employers and circularization of a "We do not Patronize" list or the consumer boycott. See *United Rubber Workers, op. cit., supra.*

426, 433; *National Labor Relations Board* v. *Women's Wear Co.*, 159 F. 2d 866, 867 (C.A. 2).[23]

Finally, as the Court in *United Rubber Workers* noted (269 F. 2d at 700), there are differences in these provisions in terms of remedy. That is, even in the situations where the same conduct would be covered by Section 8(b)(1)(A) as well as by Sections 8(b)(4)(B) or 8(b)(4)(C), the latter provisions are not redundant because they are subject to special remedial authority which is not applicable with respect to Section 8(b)(1)(A). Upon issuance of a complaint involving an 8(b)(4) violation, Section 10(l) of the Act requires that application be made to the appropriate federal district court for temporary injunctive relief. No such drastic remedy is available with respect to Section 8(b)(1)(A) violations, except to the extent that Section 10(j) of the Act vests the Board with a discretionary authority to seek injunctive relief in particular cases.[24]

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[23] As was pointed out with respect to the relation between Section 8(1) and the succeeding unfair labor practice provisions of the Wagner Act: "The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome." S. Rep. No. 573, 74th Cong., 1st Sess., p. 9.

[24] Injunctive relief under Section 10(j) of the Act has been deemed by the Board as extraordinary and application therefor has been sought in relatively few instances. See, *e.g.*, Twenty-second Annual Report of the Board (Govt. Print. Off., 1958), p. 142; Twenty-first Annual Report of the Board (Govt. Print. Off. 1957) p. 152.

3. The contention that other portions of the legislative history negate the Board's interpretation of Section 8(b)(1)(A)

The court below found confirmation for its holding in the "Legislative history and post-legislative history" (R. 186).

(a) Insofar as the former is concerned, the Court appears to be referring to the emphasis given in the legislative history of Section 8(b)(1)(A) to proscribing violence and direct economic reprisals by unions.[25] But, to assign conclusive significance to this material, is to view the legislative history too narrowly. No inference of exclusiveness may be drawn merely from extensive Congressional consideration of particular subject matter which is included in general statutory language. Cf. *American Stevedores* v. *Porello,* 330 U.S. 446, 450–454. Particularly is this true, where, as here, "the language used in the statute goes beyond th[e] limited purpose [emphasized in the legislative debates]." *National Labor Relations Board* v. *Lion Oil Co.,* 352 U.S. 282, 292. Moreover, as we have shown (pp. 25–32), the principal proponents of Section 8(b)(1)(A) plainly indicated that the concern of this provision was not violence alone, however important the purpose to curb violence may have been, but included peaceful conduct which impaired employee rights, as well. Viewed in this posture, nothing in the legislative history of Section 8(b)(1)(A) requires removing from its scope peaceful conduct which, be-

[25] Thus, the court cites (R. 186, n. 5) Board Member Murdock's dissenting opinion herein (R. 46), which dwells on this point.

cause of its inherent threat of economic harm, is fairly within the language of that Section.

(b) The Court's reference to the post-legislative history presumably refers to the Joint Committee Report of 1948.[26] This Report, subscribed to, *inter alia*, by Senators Taft and Ball, contains the statements that: "Present law in no way limits the primary strike for recognition except in the face of another union's certification." "A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it." Report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess., p. 71; see also pp. 85–87. However, as this Court has noted, this "1948 committee report is no part of the legislative history of a statute enacted in 1947." *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.[27]

[26] The Joint Committee was established by Section 401 of the Labor Management Relations Act, 1947, and was directed, *inter alia*, to study "the administration and operation of existing Federal laws relating to labor relations." The Final Report of the Committee was submitted to the Congress on December 31, 1948, a year and one-half after enactment of the 1947 amendments to the Act.

[27] In the *Lion Oil* case, and also in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75, n. 14, the Court referred to the report, but merely to show that it was consistent with the conclusions reached by the Court in *Lion Oil*, as to the meaning of Section 8(d) in a contract reopening situation; and in *Arkansas Oak Flooring*, as to the legality of a majority strike for recognition. The report was also cited in *American Newspaper Publishers Association* v. *National Labor Relations Board*, 345 U.S. 100, 108, n. 8, but only to refer to a matter

Moreover, it is not clear from the context of the Joint Committee's remarks whether the situation to which they refer is one where, unlike this case, the union striking for recognition has acquired the support of a majority of the employees.[28] Thus, immediately after the statements referred to above, the Report points out that a recognition strike may be supported by legitimate reasons where a union "acquire[s] an overwhelming majority within a few weeks following an election in which it has been rejected by the employees." Report, *op. cit.*, p. 71. But, even if the Committee's remarks went beyond that situation, there is a question as to whether it purported to describe *its* understanding of the Congressional intent as to strikes for recognition, or merely the law as then interpreted by the Board. Since the Committee's function was to report upon "the administration and operation" of the 1947 amendments (Section 402(7) of the Labor Management Relations Act), its comments respecting recognition strikes might reasonably be viewed merely as descriptive of its understanding of Board decisions in this area of the law, which, at that time, had applied Section 8(b)(1)(A) only to violence and related types of unlawful means (see n. 11, p. 27, *supra*). Thus, in its preliminary report, submitted nearly a year before the final report, the Joint Committee made no assertions as to whether

which had been committed to the Joint Committee's study. In none of these references did the Court suggest that the Report constituted an accurate guide as to Congressional intent at the time of the enactment of the 1947 amendments to the Act.

[28] This was the situation in *Arkansas Oak Flooring*, *supra*, 351 U.S. at 66, 69, 75.

Section 8(b)(1)(A) proscribed minority union strikes for recognition, but only noted that this issue had been raised in *Perry-Norvell Co.*, 80 NLRB 225, which was then pending before the Board. Report, *op. cit.*, Pt. 1, p. 28. And in its final report, at a point subsequent to the statements referred to above, the Joint Committee cited the *Perry-Norvell* decision, which had been handed down in the interim, in support of its conclusion "that such a strike is not an unfair labor practice." *Id.*, Pt. 3, p. 85. Whether the Joint Committee was correct in its reading of the *Perry-Norvell* case is, of course, immaterial (see n. 11, p. 27, *supra*). The significant fact is that the Report appears to be describing a Board decision, and not the intention of Congress a year and a half earlier.

For these reasons, we submit that the Report of the Joint Committee does not shed any conclusive light on the issue here, nor impair the Board's conclusion that the union's picketing was within the ban of Section 8(b)(1)(A) of the Act.

II. IN THE BOARD'S VIEW, THE NEW AMENDMENTS TO THE ACT DO NOT AFFECT THE VALIDITY OF THE ORDER HERE

As indicated p. 12, *supra*, subsequent to the entry of the order here and the ruling of the court below, Congress amended the Act. The new amendments, effective November 13, 1959, add a new unfair labor practice provision, Section 8(b)(7),[29] which specifically proscribes picketing for an object of:

[29] The relevant provisions of the new Act are set out in full in the Appendix, pp. 65–66, *infra*.

> * * * forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,
>
> (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

This provision covers the type of activity involved here, *i.e.*, picketing for recognition by a minority union. However, it is the Board's position that the new provision neither shows that the Board lacked power to regulate this subject previously under Section 8(b)(1)(A), nor displaces that Section as a means for regulating the subject. Rather, in the Board's view, the new Section 8(b)(7) merely supplements the power already conferred by Section 8(b)(1)(A). If that is so, the former does not affect the validity of the order here.

The legislative history of Section 8(b)(7) indicates that Congress was aware that the question of the Board's authority to reach picketing and related activity, in furtherance of a minority union's quest for recognition, under Section 8(b)(1)(A) was pending in the courts. The new provision was added in part as an insurance measure—*i.e.*, in case the courts were ultimately to decide that power did not exist under Section 8(b)(1)(A)—and in part, the Board believes, because of Congress' conclusion that the subject should be regulated even beyond that permitted by the Board's interpretation of Section 8(b)(1)(A). The new provision covers organizational picketing as well as recognition picketing, irrespective of whether the union involved is a majority or a minority union; on the other hand, Section 8(b)(1)(A), under the Board's interpretation, reaches only activity by a minority union and then only when its object is recognition (see pp. 33–34, 37, n. 16, *supra*).

The Board's position is supported by the statement made by Congressman Landrum, in introducing the provision which, with some modification in the Conference Committee, became the present Section 8(b)(7). The bill reported by the House Labor Committee, similar to the one which had passed the Senate, banned picketing for recognition or organizational purposes only where the employer was recognizing another union, or where the employees had voted against a union within the preceding nine months and the picketing union had not thereafter acquired majority support. Criticizing these

restrictions as inadequate, Congressman Landrum proposed that organizational or recognition picketing should be banned "where another union has been lawfully recognized; where a valid election has been held within the preceding 12 months; where the union cannot show that it represents at least 30 percent of the employees; and, where picketing has been in progress for a reasonable time—not exceeding 30 days—and no petition for an election has been filed" (105 Cong. Rec. (Daily Ed.) 14183, August 11, 1959). In support of this position, he stated (*ibid.*):

> For years subsequent to the passage of the Taft-Hartley law the Board did not condemn either recognitional picketing or organizational picketing by a union not representing a majority of the employees. In the *Curtis Brothers* decision, 119 NLRB No. 33, however, the Board finally * * * held that picketing for recognition by a union after it had lost a representation election was unlawful for 1 year. The U.S. Court of Appeals for the District of Columbia disagreed, holding that, under present law, minority picketing whether for "organizational" or "recognitional" purposes was lawful * * * absent certification of another union by the Board. In another case where facts are identical, the Fourth Circuit Court of Appeals disagreed and the matter is now pending on certiorari in the Supreme Court. *There is, therefore, no definitive or final word even as to this area of picketing activity.*
>
> The committee bill, however, would limit this limited proscription, by allowing minority picketing after 9 months, subsequent to a lost elec-

tion, or even allowing picketing immediately after a lost election if the union then claimed that it has signed up on application cards a majority of the employees * * *.

But this is not all. Neither the committee bill nor present NLRB law even pretends to deal effectively with organizational picketing. As a matter of fact, *the Board, in applying the Curtis decision principle, repeatedly has made it clear that its decision was in no way concerned with organizational picketing.* Nor would advertising picketing, or picketing to strengthen the union's bargaining position with other employers be limited under either the committee bill or NLRB case law. [Emphasis added.][30]

In sum, the Board believes that Congress, in enacting Section 8(b)(7), did not intend to affect or resolve the question of whether the Board already had power to reach some of the activity encompassed therein under Section 8(b)(1)(A).[31] Accordingly, if, as we have shown in Point I, Section 8(b)(1)(A) was in fact designed to permit the Board to reach the type of activity here, nothing in the enactment of the new Section 8(b)(7) impairs that conclusion, and hence

[30] See also, H. Rep. No. 741, 86th Cong., 1st Sess., p. 98 (dissenting views); 105 Cong. Rec. (Daily Ed.) 14515–14516 (August 13, 1959, Representative Clem Miller). And note S. Rep. No. 187, 86th Cong., 1st Sess., pp. 76–77 (minority views); 105 Cong. Rec. (Daily Ed.) 5964, 5969 (April 24, 1959, Senators Cooper and Goldwater).

[31] Even if its intention had been otherwise, the views of a Congress acting 12 years afterward could hardly be an accurate reflection of what the Congress which enacted Section 8(b)(1)(A) sought to encompass therein. See *United States* v. *Mine Workers*, 330 U.S. 258, 282; *Rainwater* v. *United States*, 356 U.S. 590, 593.

the Board's order in this case was validly issued under Section 8(b)(1)(A).

The question which remains is whether, even if the Board's order were valid when issued, it must nevertheless be qualified by the conditions imposed by the new Section 8(b)(7). Thus, it may be urged that, since the latter section now regulates the activity here less stringently in some respects than would section 8(b)(1)(A),[32] the order herein must be modified accordingly. For it is a general principle that an injunction, having only prospective effect, will be modified in the light of changes of law which subsequently occur (see *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 431–432).

Section 8(b)(7) concludes with the following savings clause: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)." In the Board's view, this clause makes a modification of the order herein unnecessary. That is, assuming that Section 8(b)(1)(A) of the 1947 Act proscribed picketing and related activity by a minority union in furtherance of a recognition objective, the Board thinks that the savings clause should be read as preserving that section as a supplemental means for regulating such conduct, and thus any order issued thereunder is entitled to stand without regard to the requirements of Section 8(b)(7).[33] Since Section

[32] As more than 12 months have elapsed since the Board election, Section 8(b)(7)(C) would appear to permit the union to resume picketing for a reasonable period of time not to exceed 30 days.

[33] The Board has enunciated this position in the *Sierra Fur-*

8(b)(7) covers only picketing, Section 8(b)(1)(A) would still serve as the only means for the Board to regulate other devices, *e.g.*, unfair listing and boycott appeals, which a minority union may employ to further a recognition objective (see n. 4, p. 16, *supra*). Moreover, the Board feels that there may even be some picketing situations where it would be desirable to proceed under Section 8(b)(1)(A) rather than under Section 8(b)(7). For these reasons, the Board believes that Congress, in enacting Section 8(b)(7), did not intend to displace Section 8(b)(1)(A), but only to supplement it.

Nor does the Board believe that its interpretation of the savings clause in Section 8(b)(7) is impaired by the Statement of the Managers on the Part of the House, in the Conference Report, that (H. Rep. No. 1147, 86th Cong., 1st Sess., p. 41): "Section 8(b)(7) overrules the *Curtis* and *Alloy* cases to the extent that those decisions are inconsistent with section 8(b)(7)." It is not clear whether the reference is to the Board deci-

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niture case, 125 NLRB No. 20, decided on November 17, 1959, shortly after the new amendments took effect. There, concluding that the new Section 8(b)(7) did not preclude the issuance of an order under Section 8(b)(1)(A), against picketing similar to that here, the Board stated (125 NLRB No. 20, n. 6): "We believe that the new provisions concerning recognition and/or organizational picketing merely amplify the National Labor Relations Act's Section 8(b) proscriptions. The pertinent Section of the amendments, 704(c) of Title VII, specifically provides: 'Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).' We have already determined that Section 8(b)(1)(A) prohibits minority recognition picketing." Member Fanning dissented.

sions in those cases, or to the court decisions overruling the Board, or to both. However, in the Board's view, it is significant that Congress was aware of the *United Rubber Workers* (*O'Sullivan*) case, *supra*, where the Board was sustained by the Fourth Circuit, and there was no mention in the Legislative History of any intent on the part of Congress to overrule *Rubber Workers*. In any event, since the statement purports to describe the effect of Section 8(b)(7), and not of Section 8(b)(1)(A), the Board reads it as meaning only that, insofar as the courts had previously held that the Board lacked power to regulate picketing for recognition or organizational purposes where another union had not been certified, power was now specifically supplied in Section 8(b)(7)—without passing on whether the Board already possessed the power asserted by it under Section 8(b)(1)(A).

CONCLUSION

For the foregoing reasons, the Board submits that the judgment of the court below should be reversed and the case should be remanded with instructions to enforce its order.[34]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Deputy Assistant General Counsel,
National Labor Relations Board.

NOVEMBER 1959.

[34] This submission is based on the premise that the Court agrees with the Board that new Section 8(b)(7) has supplemented, rather than displaced *pro tanto*, Section 8(b)(1)(A). If, however, the Court adopts the contrary view, the order should be modified to conform to Section 8(b)(7).

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to

employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except

cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor

organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. The relevant amendments to the National Labor Relations Act made by the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 542, Pub. Law 86-257), are as follows:

BOYCOTTS AND RECOGNITION PICKETING

SEC. 704. * * * (c) Section 8(b) of the National Labor Relations Act, as amended, is amended by striking out the word "and" at the end of paragraph (5), striking out the period at the end of paragraph (6), and inserting in lieu thereof a semicolon and the word "and", and adding a new paragraph as follows:

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question con-

cerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 34

NATIONAL LABOR RELATIONS BOARD,

PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

HERBERT S. THATCHER,
431 Tower Building,
Washington 5, D. C.,

DAVID PREVIANT,
511 Warner Building,
Milwaukee 3, Wisconsin,

Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 34

NATIONAL LABOR RELATIONS BOARD,

PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether peaceful picketing by a union, which does not represent a majority of the employees of the employer involved, for purposes of organization and to seek recognition as the employees' exclusive bargaining agent, is an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act.

THE FACTS

The facts are generally as stated by the Board in its brief. They can be reduced to the following: A union, after having won a Board-conducted election and been duly certified, is unsuccessful in negotiating a contract. Thereafter it engages in a strike and picketing in the course of which the striking employees are replaced by the employer so that the union loses its majority. The employer then invokes those portions of the Act which permit it to obtain an election, over the union's objection, in which election the striking former employees of the employer are not permitted to vote. The strikebreakers vote the union out, but the union nevertheless continues its picketing, this time seeking not a contract but the recognition which it once held. The Board then enjoins such picketing on charges filed by the employer, invoking Section 8(b)(1)(A) to do so.

The picketing was at all times entirely peaceful (R. 67). The business operations of the Company were not disrupted by the picketing, and there was no stoppage of delivery trucks or interference with the receiving of supplies or the sending out of merchandise, and there is no showing or attempt to show that the picketing resulted in any economic loss or other injury whatsoever to the employer or to its strike replacements. The Trial Examiner specifically found, and the Board's majority opinion did

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[1] The Board's statement of the question presented assumes that the demand was for purposes of "immediate" recognition. There is absolutely nothing in the record to support this conclusion concerning the immediacy of the demand, but, on the contrary, such a conclusion is directly negated by the outright repudiation of claim for exclusive recognition contained in the union's letter of February 16th (R. 14). Moreover, it is clear from a reading of the Board's decision as a whole that this factor of immediacy did not constitute any element in the Board's conclusion that minority picketing for recognition was proscribed by Section 8(b)(1)(A), and the holding of the Board is such as to proscribe all such picketing regardless of any question of immediacy.

not controvert, that nothing in the Union's conduct "directly threatened or intimidated the employees in the exercise of their rights guaranteed in Section 7." (R. 79.)

SUMMARY OF ARGUMENT

I

Picketing to secure the recognition of a minority union does not violate Section 8(b)(1)(A) of the Act as is contended by the Board. As indicated by the legislative history of that section, Congress intended thereby merely to deal with activities of unions which, by means of violence or similar intimidation, sought to deprive employees of rights protected under Section 7.

A. Section 8(b)(4)(C) of the Act, expressly dealing with recognition picketing, is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A) made at the time it rendered its decision herein, and the newly enacted Section 8(b)(7) of the Act, expressly dealing with other aspects of organizational and recognition picketing, is the key to the invalidity of the Board's present contention that Section 8(b)(1) continues to provide the Board with a broad means of regulating minority picketing for purposes of organization or recognition. By Section 8(b)(4)(C) Congress had then, and by Section 8(b)(7) has now, expressed the sole extent to which it intended to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress had restricted such picketing for recognition only in the situation where another union has been certified by the Board as the representative of the employees just as 8(b)(7) now restricts such picketing in greater scope but to a lesser degree than now asserted by the Board. To prohibit picketing for recognition in other and additional situations, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

B. If Sections 8(b)(4)(C) and 8(b)(7) mean what they say, then Section 8(b)(1)(A) cannot mean what the Board holds. These former two sections and the latter have separate functions which do not overlap. Section 8(b)(4) [and now Section 8(b)(7)] is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing, because its *purpose* is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme.

C. The legislative history of Section 8(b)(4)(C); subsequent efforts in Congress to regulate minority picketing for recognition in broader scope and in more detail; and, finally, the legislative history of the recently enacted Section 8(b)(7) which deals specifically with various areas of regulation of recognition picketing, all go to show that Congress, following considerable discussion and debate, has set forth precisely to what degree it considered recognition picketing should be curtailed by the Board. It is not for the Board to be a super-Congress and to proscribe in areas unreached by Congress in Sections 8(b)(4)(C) and 8(b)(7).

D. The Board's construction of Section 8(b)(1)(A) conflicts with Sections 8(c) and 13; it reverses a long-standing

interpretation; and it renders Sections 8(b)(4)(C) and 8(b)(7) redundant.

1. Section 8(c) protects, and peaceful picketing constitutes, the "expressing" and "dissemination" of "views, argument, or opinion" "in written, printed, graphic, or visual form." The Supreme Court's decision in *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section 8(c) to guarantee its immunity.

2. "By § 13, Congress has made it clear that • • • all • • • parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 673. There is nothing in Section 8(b)(1)(A) which "specifically" provides for the impairment of the right to strike and picket which the Board would effect. See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 284. Little indeed would be left of the right to strike if the right to picket were not protected as an inseparable part of it (*Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504-505), and for that reason Section 13 cloaks both (*Sales Drivers Union* v. *N.L.R.B.*, 229 F. 2d 514, 517-518, cert. denied, 351 U.S. 972).

3. By its present construction of Section 8(b)(1)(A), adopted late in 1957, the Board overturns a settled and uniform interpretation first made in 1948, within a year of the effective date of the Taft-Hartley amendments in 1947, and undeviatingly adhered to for nine years. "At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation." *United States* v. *Chi. N.S. & Mil. R. Co.*, 288 U.S. 1, 13-14.

4. Section 8(b)(4)(C) [and now Section 8(b)(7) of the

Act] "has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Sections 8(b)(4)(C) and 8(b)(7) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to a useless gesture."* It goes without saying that "We are not at liberty to construe any statute so as to deny effect to any part of its language." *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116.

E. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99-100. The Board in this case has isolated a single principle, pushed it to an unreasonable extreme, and reached a determination which Congress, fully aware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing.

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*Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430.

ARGUMENT

I

PRELIMINARY CONSIDERATIONS

Prior to the decision of the Board in the instant case, Section 8(b)(1)(A) had never been thought available for the purpose of dealing with minority union picketing; on the contrary, as will be seen, that Section had heretofore been thought to apply only to enjoining union conduct, whether involving picketing or other type of activity, which is violent in nature and is designed directly to coerce employees in the intimidatory sense through fear of direct physical or economic retaliation. That Section, insofar as it had relation to picketing at all, was concerned with the manner or method of picketing and not the objects thereof; the latter were dealt with in Section 8(b)(4) and later in Section 8(b)(7). In other words, the Section was intended to proscribe actual duress, not the indirect pressure that is the result of all picketing.

Notwithstanding all this, the Board has here found "restraint or coercion" to exist in the mere possibility that the picketing might serve to cause economic loss to the employer, which in turn might be reflected by possible economic loss to the employees of the employer, so that this fear of possible economic loss operates to interfere with the free choice and selection of bargaining representatives given employees under Section 7 of the Act, as well as to coerce the employer into "unlawfully" dealing with a minority union.

We will see that on the basis of the foregoing reasoning the Board could find justification for proscription of all picketing, regardless of its purpose or means, for all picketing has this effect. We will see that picketing or other similar inducements to strike action as such are not specifically proscribed by Section 8(b)(1)(A), and that Section 13 of the Act protects the right to picket unless other-

wise "specifically" dealt with. We shall further see that under Section 8(b)(4)(C) of the Taft-Hartley Act, as enacted in 1947, and under Section 8(b)(7) of the newly enacted Labor-Management Reporting and Disclosure Act of 1959, Congress has specifically, and in detail, dealt with the subject of picketing which is carried on for purposes of organization or recognition.

In view of the foregoing, it would appear that the Board has a heavy burden to support its present position that Section 8(b)(1)(A) of the Act was, and is, intended to give to the plain or literal language of Section 8(b)(1)(A) picketing for purposes of organization or recognition in the broad and undefined areas not embraced under Section 8(b)(4)(C) of the Taft-Hartley Act, and not embraced under Section 8(b)(7) of the Act as amended in 1959.

The Board is unable to support its burden by reference to the plain or literal language of Section 8(b)(1)(A) which makes no reference to picketing as such. Of necessity then, it turns to references to the legislative history of Section 8(b)(1)(A) which, we will see, at best are inconclusive, and then to arguments of policy which, if they have any validity at all, are better directed to Congress, and which, in fact, have quite recently been directed to Congress, with the result that that body, in response, has enacted a new section of the Taft-Hartley Act, designated as Section 8(b)(7), which section deals specifically and in detail with the subject of picketing for purposes of organization or recognition. In this case the Board, notwithstanding this recent action of Congress in imposing various restrictions and prohibitions on the right to picket for organization or recognition, and unmindful of the suggestion of the Solicitor General that this recent action of Congress has disposed of the matter (Memorandum for the National Labor Relations Board, filed in *United Rubber Workers* v. *N.L.R.B.*, No. 316, October Term, 1959, pp. 3-5), proceeds to seek three strings to its anti-picketing bow—the strong but

specific one recently given it by Congress under Section 8(b)(7), the earlier one given it under Section 8(b)(4)(C) and, in addition, the broad, all-encompassing one which it contends was granted under Section 8(b)(1)(A). For the Board to take such a position indicates a point of view "so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretive process". (*Western Union Telegraph Company* v. *Lenroot*, 323 U.S. 490 at 508.)

II

WHAT IS "ORGANIZATION" OR "RECOGNITION" PICKETING AND THE EXTENT TO WHICH SUCH PICKETING HAS, UP THROUGH TAFT-HARTLEY IN 1947, BEEN SANCTIONED BY THE COURTS AND THE CONGRESS.

A. The Principle as Recognized by the Courts.

Before proceeding to answer the Board's various arguments, it might be well to examine briefly what is implied in the concept of "recognition" picketing so traditional in the labor movement but here under attack, and to see just how the courts and the Congress, up to the time of the enactment of Section 8(b)(1) and Section 8(b)(4)(C), have regarded that type of picketing. If, as we think true, there has been a general acceptance of the practice of picketing for purposes of organization or recognition—indeed, there has been a national labor policy affording that type of picketing protection (cf. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448)—it cannot be easily assumed that Congress would attempt to proscribe or limit the practice other than by specific language precisely directed to practices which Congress thought required limitation.

Whatever may be the rights under Section 7 of the Act of unorganized employees, such as those employed by Curtis in the present case, to refrain from union activities,

or to act as strike breakers, or to choose to have no union to bargain for them, there are other and corresponding rights which are not subordinate to these rights of the non-union employees, and which find equal protection under Section 7 of the Act as well as in the general framework of the Federal labor policy as earlier set forth in the Clayton Act and the Norris-LaGuardia Act. One of the most important of these union rights is the right to seek organization and collective bargaining relationships throughout an entire trade or industry in particular communities as a means of stabilizing competitive wage rates and working conditions within such trade or industry. In the present case, for instance, Petitioner Local Union 639 must of necessity seek to organize the complacent employees of the Curtis Company and achieve a collective bargaining relationship with it in order to protect the wages and working conditions of other members of the Union working in other storage and furniture stores in the Washington, D. C., area. This was done by picketing Curtis for purposes of organization and recognition.[3]

[3] The Union in the present case was influenced to picket Curtis for considerations in addition to a desire to extend organization throughout the storage and furniture industry. Here it had already achieved recognition and bargaining rights, following which it had engaged in a strike, with resultant picketing. The bargaining negotiations having broken down over the issue of union security, the Union had the choice either of capitulating or of bringing into play its traditional economic weapon. In the course of the strike and because of it, the Union lost its former majority, and when the Employer took advantage of a much criticized provision of Taft-Hartley to force the Union into an election in which the strikers could not vote, the Union lost its bargaining rights completely. If ever there existed moral or economic justification in a labor dispute for picketing to protest this course of events and to regain the position which the Union once held, that justification exists in this case; until the majority decision of the Board herein it had never been generally suggested that the picketing under the circumstances of this case was even subject to criticism, let alone constituted a violation of Federal law.

The principle of picketing for such purposes has long been accorded recognition by our courts. In *American Steel Foundries* v. *Tri-Cities Central Trades Council, et al.*, 257 U.S. 184, at 209, Chief Justice Taft stated that to render collective bargaining effective:

> "employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united, because in the competition between employees, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious . . . ."

In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, Justice Stone restated the proposition as follows (at p. 503):

> "Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

More lately, in *American Federation of Labor* v. *Swing*, 312 U.S. 321, at 326, the Court stated:

> "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer

> and those directly employed by him. The inter-dependence of economic interest of all engaged in the same industry has become a commonplace."

A classic expression of the principle is contained in the decision of Judge Andrews in *Exchange Bakery* v. *Rifkin*, 245 N.Y. 260, at 263; 157 N.E. 130, at 132:

> "The purpose of a labor union to improve the conditions under which its members do their work . . . may justify what would otherwise be a wrong. So would an effort to increase its members and to unionize an entire trade or business . . . Economic organization today is based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor . . . Resulting injury is incidental and must be endured."

B. The Principle as Recognized by Congress.

To obtain an understanding of how Congress regarded the concept of organizational or recognition picketing as of the time of Taft-Hartley, it is helpful—indeed necessary—to examine Congressional enactments in the field. *U.S.* v. *Hutcheson*, 312 U.S. 219. It is significant that Congress, both in the Norris-LaGuardia Act (47 Stat. 70) and in Taft-Hartley (as well as, of course, in the Wagner Act as the predecessor to Taft-Hartley), recognized the principle expressed in the above quoted citations from the *Tri-Cities*, *Apex* and *Swing* cases. It was abuse of the use of the injunction to bar recognition or organizational picketing, at least in part, which prompted Congress to give attention to that right and free it from the injunctive process in the Federal courts. See Frankfurter and Greene, *The Labor Injunction*, and *Report on the Labor Injunction to the*

Senate Labor Committee, dated February 8, 1951, 27 LRRM 37. The Norris-LaGuardia Act (Sec. 104) provides that no court shall issue an injunction prohibiting any person or union from "Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence". That Act [Sec. 113 (e)] further goes on to define the phrase "labor dispute" as including "any controversy concerning terms or conditions of employment, or concerning the association or *representation* of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis supplied.)

By giving particular protection to the right of union members to picket in a dispute over representation, and this regardless of whether any of the union members were employed by the employer or whether an employer-employee relationship existed, Congress would appear to have sought, as part of a national labor policy, to protect the type of picketing involved in the present case. Obviously, an injunction could not be obtained in the Federal courts under the provisions of the Norris-LaGuardia Act to enjoin the picketing in the present case. See *Fur Workers Union, Local 72*, v. *Fur Workers Union, Local 1939*, 105 F. 2d 1, 70 App. Div. 122, aff'd in 308 U.S. 522. In view of this Congressionally-expressed policy of protecting the type of picketing here engaged in, it would seem that Congress would have used very clear language in the subsequently adopted Taft-Hartley Act if it intended to reverse this policy. Federal enactments in the field of labor relations, it must be remembered, must be read as a comprehensive whole where we have before us legislation which "is practically and historically one of a series of enactments touching one of the most sensitive national problems." *United States* v. *Hutcheson*, 312 U.S. 219, 235.[28]

[3a] It is an essential premise of the Board's decision (119 NLRB at 238-39) as well as of its brief here (Pet. Br. 28-29), that an employer commits an unfair labor practice whenever he gives exclusive recognition to a union which does not represent a majority of the employees in the appropriate unit. This proposition—presented here as an *ipse dixit*—is unsupportable under the statute, and is erroneous as a matter of principle.

The only reference in the statute to *exclusive* representation is in § 9(a), which provides that a majority union shall be the exclusive bargaining representative of the employees in an appropriate unit. § 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the § 9(a) representative, that is, with the majority union. But it does not follow from the fact that it is an unfair labor practice *not* to bargain with a majority union as exclusive representative, that it is permissible to do so *only if* it is the majority union. Just because activity is not required by law does not mean that it is prohibited. Compare *San Diego Unions* v. *Garmon*, 359 U.S. 236. Sections 2(5) and 2(9) of the Act recognized that a labor organization could and did negotiate for changes in working conditions *even when no employees* were represented. *A fortiori*, it could bargain for changes when *some* employees, less than a majority, was represented. In emphasizing the importance of the broad definition in Section 2(9), the House Committee made specific reference to the *American Steel Foundries* case, *supra* p. 11. See H. Rep. No. 1147, 74 Cong., 1st Sess. 100 et seq.

By express legislative history, Congress was thus guaranteeing the right to picket as illustrated by the *American Steel Foundries Case*. The definition of labor dispute in § 2(9) of the Wagner Act was retained in the Taft-Hartley Amendments as a matter of deliberate choice, having been omitted from the House Bill partly to reverse Board decisions holding that a labor dispute exists "whenever a union disagrees with an employer on any subject, *notwithstanding that the union does not represent employees of the employer . . .*" H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 18-19, in 1 Leg. Hist. 309-310 (emphasis supplied). The Senate version, which retained the Wagner Act definition, prevailed in conference, and in the bill. The Congress thus consciously adopted the Board's interpretation of "labor dispute" as including the "stranger" situation, and the present Board is merely trying to read the rejected House view into the statute.

Rather than discuss the merits of this premise whose ramifications extend far beyond the present case, the Board states flatly that the issue is "settled" in its favor. (Pet. Br. 26.) On the contrary. Of the judicial decisions cited by the Board, *id.* at n. 10, all but one involves a situation in which more than one union was involved, and the statement in *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 268 F.2d 901, 905 (C.A. 5) was mere dictum.

The situation of two conflicting unions is significantly different, for the employer's aid to one union, by recognition or otherwise, interferes with the free choice of the employees among representatives. This was the situation in *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, and the decision of the 4th and 9th Circuits cited by the Board. In the *Greyhound* case this Court stressed the Legislative History in which Congress had noted that "once an employer has conferred recognition on a particular organization *it has a marked advantage over any other* in securing the adherence of employees, *and hence in preventing the recognition of any other*. 303 U.S. 261, 267 (emphasis supplied).

That Congress did not intend under the general terms of Section 8(b)(1)(A) of the Taft-Hartley Act to repeal the national policy of protecting recognition or organizational picketing by majority or minority unions is seen in many ways. First, Taft-Hartley itself recognizes the extension-of-organization principle set forth in the *Tri-Cities* and related cases and in the Norris-LaGuardia Act, when in the Declaration of Policy contained in that Act (Sec. 1) it is pointed out that the inequality of bargaining power of unorganized employees burdens commerce "by depressing wage rates and the purchasing power of wage earners in industry and *by preventing the stabilization of competitive wage rates and working conditions within and between industries*". (Emphasis supplied.)

Secondly, the Taft-Hartley Act (Sec. 2 (9)) adopts the same broad definition of "labor dispute" that is contained in the Norris-LaGuardia Act, again reaffirming that such a dispute can exist in a dispute over representation where there is no proximate employer-employee relationship. Finally, the Taft-Hartley Act, in Section 7, adopts the same broad description and protection of the rights of self-organization and collective bargaining and engaging in concerted activities for purposes of mutual aid and protection as is contained in the Declaration of Policy of the Norris-LaGuardia (Sec. 102) and as was contained in Section 7 of the Wagner Act.

After the Senate-House conference on the Taft-Hartley bill, Senator Taft stated on the floor of the Senate:

"The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which were in the Senate bill and were approved by the Senate. The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes." (93 Cong. Rec. 6603.)

It would appear that these Taft-Hartley reaffirmations of a national labor policy which seeks to protect the right of working men to engage in concerted activities for their mutual aid and protection, with particular reference here to the need for eliminating conditions which prevent the stabilization of competitive wage rates and working conditions within industries, are entirely at variance with the prohibitions on recognition picketing that the majority of the Board seeks to read into Sec. 8(b)(1)(A) of the Act. And certainly, if Congress had intended such prohibitions, it would have done so directly, by express language, and not by the devious and indirect means of 8(b)(1)(A) generalities.

C. Congress, in enacting Section 13 of the Act, gave special and explicit protection to the right to strike and picket for traditional purposes.

Congress did not stop with the safeguards in Section 1 and Section 7. Possibly fearful of administrative attempts to nullify the rights there protected, it made certain that the Act's other broad provisions would not be utilized, by a process of administrative interpretation, for the purpose of outlawing striking or picketing activities which prior to Taft-Hartley had not been federally condemned, and which Congress itself in Taft-Hartley had not specifically condemned. It did so by the enactment of Section 13 of the Act. Section 13 reads as follows:

"Sec. 13. Nothing in this Act, except as *specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish *in any way* the

right to strike, or to affect the limitations or qualifications on that right." (Emphasis supplied.)

This Court had occasion to consider the meaning and effect of this provision in the case of *N.L.R.B.* v. *International Rice Milling Co.*, 241 U.S. 665. It there stated (p. 672):

> "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in § 13 as follows:
>
> "'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.'" (61 Stat. 151, 29 U.S.C. (Supp. III) § 163.)
>
> "By 13, Congress has made it clear that § 8(b)(4), *and all other parts of the Act* which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read *only* if such interference, impediment or diminution is '*specifically provided for*' in the Act. No such specific provision in § 8(b)(4) reaches the incident here. The material legislative history supports this view." (Emphasis supplied.)[4]

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[4] The Board in its brief in the present case does not argue that the right to picket can not be equated with the right to strike under Section 13. It is to be noted that the *Rice Milling* case, supra, involved picketing only, there being no strike of *Rice Milling* employees. The Board has consistently equated striking with picketing as far as Section 13 protections are concerned. See e.g. *Schultz Refrigerated Service, Inc.*, 87 NLRB 502. The Court of Appeals for the District of Columbia, in *Campbell Coal (Sales Drivers, Helpers & Building Construction Drivers Local Union 859*, etc. v. *NLRB*, 97 U.S. App. D. C. 173, 229 F. 2d 514, cert. den. 351 U. S. 972) has directly equated striking with picketing and has given picketing the same protection under Section 13 that striking has under that section.

III

MINORITY PICKETING FOR RECOGNITION IS NOT SPECIFICALLY PROSCRIBED UNDER SECTION 8(b)(1)(A); NOR DOES ITS LEGISLATIVE HISTORY INDICATE ANY INTENT TO DO SO

A. Section 8(b)(1)(A) does not by its terms proscribe minority picketing for recognition.

Returning now to the question of just what Congress has done in respect to recognition picketing, the answer is that it is *not* specifically provided in Section 8(b)(1)(A) that picketing for organizational purposes or for recognition, following the losing of a Board-conducted election, or by a minority union, is unlawful. Indeed, when it has taken some 30 pages of tortuous argument by the Board majority in its opinion in this case to demonstrate that picketing in the circumstances of this case is unlawful, it can hardly be asserted that the present picketing has been *specifically* outlawed. Section 8(b)(1)(A) provides simply that it shall be an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7". On the other hand there are specific proscriptions in Sections 8(b)(4)(C) & 8(b)(7).

B. The Legislative History of Section 8(b)(1)(A).

What was the purpose of Section 8(b)(1)(A)? A study of the legislative history of that section reveals clearly that its purpose was to enjoin union activities which were violent in nature, and which sought, through use of physical violence or threat thereof, to coerce employees in the exercise of the right granted to them in Section 7 to refrain from joining or cooperating with a union.

Section 8(b)(1)(A) originated in the Senate and had no counterpart in that form in the House. After the Senate Labor Committee by a closely divided vote rejected its

inclusion in the bill it would report,[5] a minority stated it would offer on the Senate floor an amendment making it an unfair labor practice for a union "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[6] The thought behind the amendment was the "many instances of union coercion of employees such as that brought about by *threats of reprisal* against employees and their families in the course of organizing campaigns; also direct interference by *mass picketing and other violence.* * * * We believe that the freedom of the individual workman should be protected from duress by the union as well as duress by the employer"[7] (Emphasis supplied.)

The amendment was thereafter offered on the Senate floor by Senator Ball.[8] It met with much opposition.[9] To placate that opposition the words "interfere with" were expunged from the amendment by unanimous consent.[10] This was done to allay fear that, in derogation of "union organizational activities," the amendment could "be construed to mean that any conversation, any persuasion, any urging upon the part of any person to persuade another to join a labor organization, would constitute an unfair labor practice."[11]

Even as so restricted, it was charged that the amendment "would slow up the organizational activity of unions,"[12] that "it will have the effect of outlawing organizational strikes and strikes for recognition."[13] In answer to this charge a colloquy ensued between Senators Taft

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[5] S. Rep. No. 105, 80th Cong., 1st Sess., 50, in 1 Leg. Hist. 456; 93 Cong. Rec. 4435, in 2 Leg. Hist. 1204.
[6] *Ibid.*
[7] *Ibid.*
[8] 93 Cong. Rec. 4016, in 2 Leg. Hist. 1018.
[9] 93 Cong. Rec. 4016-4025, in 2 Leg. Hist. 1018-1033.
[10] 93 Cong. Rec. 4271, in 2 Leg. Hist. 1138-1139.
[11] *Ibid.*
[12] 93 Cong. Rec. 4430, in 2 Leg. Hist. 1195.
[13] 93 Cong. Rec. 4431, in 2 Leg. Hist. 1197.

and Saltonstall which has every earmark of being the definitive summing up by its proponents of the reach of Section 8(b)(1)(A). Senator Saltonstall initiated the colloquy: "I would appreciate very much, in order to make the matter clear in my own mind, if . . . Senator [Taft] . . . would give an example of a restraint he would consider an unfair labor practice, an action which would not be a restraint, an action which would be coercion, and an action which would not be coercion, within the meaning of the words of the bill and the amendment."[14] Senator Taft began by stating his understanding of the reach of the existing section against employers:[15]

> ". . . I understand the present section against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence . . ."

Senator Taft then explained the reach of the amendment against unions:[16]

> "In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed-shop

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[14] 93 Cong. Rec. 4435, in 2 Leg. Hist. 1205.
[15] *Ibid.*
[16] 93 Cong. Rec. 4435-4436, in 2 Leg. Hist. 1205.

agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. I think, when we get to the case of unions, there might be the actually violent act of forcibly, by mass picketing, preventing a man from working.

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be a restraint and coercion against those employees, an interference with their right to work."

Senator Taft then summed up:[17]

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, *"You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them,* but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment." (Emphasis supplied.)

• • •

"[The amendment] will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. *It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees."* (Emphasis supplied.)

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[17] 93 Cong. Rec. 4436, in 2 Leg. Hist. 1206, 1207.

> • • • It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, *conducting peaceful picketing, or employing persuasion.*". (Emphasis supplied.)

In a later analysis, Senator Taft explained that the prohibitions of Section 8(b)(1)(A) "apply to *coercive acts* of unions against employees who do not wish to join or did not care to participate in a strike or a picket line";[18] and the "coercive conduct" against which the employee is protected is "physical and economic coercion. For example, in the absence of a valid compulsory union-membership contract if a union compelled a man to join it or to sign an application card by threatening him with loss of his job, this would be economic coercion. Both threats of violence and threats of this kind are prohibited. • • • [It] will cover intimidating conduct or physical force used . . . [in] picketing. . . ."[19]

What clearly emerges from the debate is absolute affirmation that peaceful picketing is not comprehended within the concept of restraint and coercion. There is unequivocal assurance that "you can put up signs;" that none of the "peaceful methods of organizing employees" is affected: that no one would be prevented from "conducting peaceful picketing."[20] Indeed, the kind of picketing which does fall within the scope of Section 8(b)(1)(A)—mass or violent—denotes precisely the picketing which does not—peaceful. And on the face of Section 8(b)(1)(A) it would be an extraordinary interpretation of its words to find, as in this case, that it constituted restraint or coercion for a single picket to walk quietly up and down in front of an employer's premises carrying a sign.

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[18] 93 Cong. Rec. 6859, in 2 Leg. Hist. 1623 (emphasis supplied).

[19] 93 Cong. Rec. A3369.

[20] In 1949 Senator Taft, together with Senators Smith and Donnell, labelled as "of course . . . untrue" the charge that Section 8(b)(1)(A) "forbids 'peaceful' picketing." S. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess., 24.

Nor is there any substantial showing that it was thought that within the meaning of Section 8(b)(1)(A) peaceful picketing acquires the character of restraint or coercion because of the purpose it furthers. To be sure, the Board musters a few examples from an early stage of the debate which may tend to suggest this (Bd. Br. p. 28). But each of these examples was tendered *prior* to the deletion of the words "interfere with" from Section 8(b)(1)(A). It may be that, viewed nakedly, the deletion is not substantial, but its true significance lies in its reflection of a marked change in mood.[21] For the earlier expansiveness in describing Section 8(b)(1)(A) was never again suggested after this change. For example, before the change, Senator Ball was strident in his claim that Section 8(b)(1)(A) would reach "false promises or false statements" by unions;[22] after the change, Senator Ball agreed that Section 8(b)(1)(A) does not reach "misrepresentation."[23] And, after the change, Senator Taft's authoritative explanation of Section 8(b)(1)(A) did not even intimate that peaceful picketing would come within its purview by virtue of its purpose. It is fair to say that, whatever ambitions its proponents may have had for Section 8(b)(1)(A) at the beginning, they quickly squelched them in favor of a more modest role, lest they fail to have any acceptance of it at all.

C. The lack of analogy between Secs. 8(b)(1)(A) and 8(a)(1).

Nor is the Board's position helped by the much stressed circumstance that the Section 8(b)(1)(A) restriction upon unions parallels the Section 8(a)(1) restriction upon employers. Both employers and unions are subjected to a duty to the employees, and in that meaningful sense equality is established between them. But the duty may be different precisely because unions and employers are different in character, function, and history. "The same words, in different settings, may not mean the same thing."[24] Even

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[21] *Cf. Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487.
[22] 93 Cong. Rec. 4016, 4017, in 2 Leg. Hist. 1018-1019, 1020.
[23] 93 Cong. Rec. 4434, in 2 Leg. Hist. 1202.
[24] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678.

before the deletion of the words "interfere with," Senator Taft recognized that interference, restraint, and coercion in application to labor organizations may have a "different implication. . . ."[25] And so, "Because Section 8(b)(1) was designed as the co-part of Section 8(a)(1), it does not follow that each and every rule established by the Board in cases involving employer interference, restraint, and coercion must mechanically be transposed to cases involving union restraint and coercion, with every 'i' dotted and every 't' crossed and without regard to whether or not the controlling principles are the same."[26] It is thus not "very significant that Section 8(b)(1) follows the familiar phraseology of Section 8(a)(1), although it omits the word 'interfere', or that its sponsors repeatedly explained that the new section would make it unfair for labor organizations to engage in activities which were unfair when engaged in by employers. While the Board's decisions under the older section may give some slight help in interpreting the new provision, it is clear that there are important differences." Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 30-31 (1947).[27]

[25] 93 Cong. Rec. 4023, in 2 Leg. Hist. 1028.

[26] *International Typographical Union*, 86 NLRB 951, 1021, affirmed on this point, 193 F. 2d 782, 801, 806 (C.A. 7), cert. denied, 344 U.S. 812.

[27] The writer goes on to say: "For example, although an employer is forbidden to express the hope that he may be able to raise wages and improve working conditions if the union is defeated, the counter-argument made by labor organizations to secure union members that if enough employees join the union it will be able to obtain additional advantages—is clearly legitimate. Nor would it seem to be improper for a union to promise economic advantages only to those who become members. Many unions offer mutual insurance, vacations, and similar benefits to members, in addition to what is obtained by collective bargaining, which surely they must be free to point out in seeking members. Much the same distinction is true of social pressures. While an employer may not segregate a union employee in order to hold him up to the ridicule of his fellows, it will scarcely be asserted that labor organizations are forbidden to ostracize nonmembers or to impose other social pressures upon them."

D. Section 9(c)(3) is not applicable.

The Board also contends that Section 9(c)(3) of the Act supports its interpretation of Section 8(b)(1)(A), the argument being that, as Section 9(c)(3) prohibits the Board's direction of a second election within one year of the Board's conduct of a valid election within the bargaining unit, the policy of Section 9(c) (3) is subverted if a union may strike or picket for recognition during a period that the Board's election machinery is unavailable. The argument proves too much. If it were valid, it would prohibit a recognition strike or picketing by a majority no less than a minority within one year of a previous election, for in either event the Board may not conduct an election during that time. No one suggests that this can possibly be true. *Ecko Products Co.*, 117 NLRB 137, 142-144. Furthermore, it is settled that the Board's election machinery exists as an alternative to, not in lieu of, self-help to secure recognition. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. Nothing in Section 9(c)(3) is designed to affect this fundamental premise. Its role is considerably more modest. Its purpose is to bring about a single change in the Board's pre-1957 electoral practice. Before 1947 the Board would entertain a petition of a defeated union for a second election within a year of the union's loss of a preceding election in substantially the same unit if it made "a showing of renewed and extended organizational efforts." *Borden Company*, 69 NLRB 947, 948, and cases cited at notes 4 and 7. See also, *J. C. Blair Co.*, 74 NLRB 408, 409. Critical of this practice (S. Rep. No. 105, 80th Cong., 1st Sess., 25, in 1 Leg. Hist. 431), Congress enacted a blanket prohibition against the Board's conduct of a second election within a year of the first regardless of the petitioning union's new and improved showing of support obtained after the first election. The terms of Section 9(c)(3) do not express, and its purpose does not go beyond, any objective other than this narrow procedural limitation upon access to the Board's election machinery. Indeed, as

the report of the Joint Committee states, the very fact that the Board's electoral processes are unavailable for a year after an election is itself a reason in favor of not prohibiting recognition strikes and picketing during that time, there being no other means by which the employees can compel recognition.

The upshot is that the insubstantial fragments upon which the Board relies cannot reasonably support the extravagant meaning it imputes to Section 8(b)(1)(A). Picketing is within 8(b)(1)(A) only to the extent of curbing its conduct by coercive means; if picketing is peaceful, 8(b)(1)(A) is indifferent to the end it serves.

E. The distinction between Section 8(b)(1)(A) and Section 8(b)(4).

Final support to our over-all position is obtained when Section 8(b)(1)(A) is compared with Section 8(b)(4). Section 8(b)(4) is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing because its purpose is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme:

F. The fallacy of the Board's argument that picketing is per se coercive.

The Board objects, however, that Section 8(b)(1)A) prohibits restraint and coercion of employees *simpliciter;* that peaceful picketing, if successful, causes an employer to lose business; that this loss operates also as economic pressure upon the employees who earn their livelihood from that business; and that peaceful picketing is therefore a coercive technique squarely within the ordinary meaning of the words "restrain or coerce". The obvious vice in the argument is that it engulfs all peaceful picketing whatever its purpose. For this consequence of picketing ensues regardless of the end it serves.[28] The question-begging character of the argument has been recently lucidly exposed by the Arizona Supreme Court (*International Brotherhood of Carpenters, Local 857* v. *Storms Construction Co.*, 324 P.2d 1002, 1005, 42 LRRM 2116, 2119):

> "We recognize that the obvious result of picketing is the refusal of other union employees to cross the picket

[28] The Board has forgotten that peacefully-conducted picketing is not "coercive" in an illegal, common law sense of that term. See "Picketing and Coercion: A Jurisprudence of Epitaph," Edgar A. Jones, 39 Virginia Law Review, p. 1023. While picketing undeniably results in pressure being brought to bear upon the picketed concern through actual or possible business loss, that pressure is something which is no more condemned in our society than other aspects of competition in our economy, such as price cutting which profits one concern at the expense of another. So long as no anti-trust element is present, the latter practice is regarded as a normal and proper feature of our society even though it may drive a business firm out of existence. There is no more reason to bewail the demise of a picketed concern with which a union is engaged in a legitimate primary dispute than that of an undercut concern; both are gone as a result of economic competition but not by "coercion" in the common law sense. And employees who have voted "No Union" are, as a group, in economic competition with the strikers or with employees of other employers who are members of the rejected union. To allow one group to picket the other reflects nothing but adherence to the basic premise in our country that competition rather than government fiat shall be the market place determinant of both profits and wages.

line and thereby curtail the delivery of material and supplies to plaintiff's building project. The economic effect of picketing is a matter of general knowledge. But the effect is the same whether the peaceful picketing is for a lawful or an unlawful object. Hence, proof alone of the economic effect of picketing on the employer is not sufficient as a matter of law to establish an unlawful object or purpose which the state can prohibit."

Neither is it a sufficient basis for the Board to act.

Nor is there any escape from the patent impossibility of the Board's interpretation—one which outlaws all peaceful picketing—by looking to that part of Section 8(b)(1)(A) which confines its operation to restraint and coercion of employees "in the exercise of the rights guaranteed in Section 7." For Section 7 guarantees the right to engage in and "to refrain from *any or all of*" union activity. There is virtually no union activity to which some employees are not opposed. Upon the Board's analysis of the coercive consequence of peaceful picketing, any picketing in furtherance of any union activity will inescapably restrain and coerce some employees in the exercise of their right to refrain from it. *National Maritime Union*, 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954; *Perry Norvell Co.*, 80 NLRB 223, 240.

The Board recognizes the dilemma of its position. It seeks to extricate itself by saying that it will strike a balance between practices inimical to the organizational freedom of employees and the need for protection of legitimate competing interests and it will not curb picketing if the restraint it exerts is justified as necessary to the protection of a competing interest which the Act recognizes. Thus the Board, starting from the comfort of "a clear and literal violation of Section 8(b)(1)(A)," quickly abandons it, because its reading clearly and literally prohibits all picketing. To make its escape the Board would arrogate

to itself the role of social arbiter of what it is good or bad to picket for. And the escape the Board thus makes identifies the precise vice of its interpretation. For the balance the Board would strike, Congress has already struck for itself. Congress has in Sections 8(b)(4)(C) and 8(b)(7) defined the exact extent to which it means to go in curbing picketing for recognition purposes. It has left no penumbral area which the Board is free to explore for itself. Instead, both before and after the enactment of Section 8(b)(4)(C), Congress has shown itself fully alert to the complete range of the problem, and it has as a matter of deliberate choice declined to go beyond the point first fixed by Section 8(b)(4)(C) and now fixed by Section 8(b)(7). That choice may be good, bad, or indifferent, but it is for Congress to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363.

In any event, as far as the picketed employees themselves are concerned, peaceful picketing for recognition at best has only a very remote "coercive" effect. In the present case, for instance, it was specifically found that the Union's peaceful picketing in no way directly threatened or intimidated Curtis' employees in the exercise of any rights guaranteed under the Act. Curtis' employees were in no way molested or interfered with in the carrying on of their duties, or in entering or leaving their employer's premises, or at their homes; indeed, they were not even addressed by the pickets who followed their Union's instructions to remain silent while picketing. All that we have here and all that the Board relies on is some indirect and wholly speculative economic loss that the Company's em-

ployees may suffer if, in turn, their employer suffered adverse financial effects as a result of the picketing. And even as to this, there is no attempt to show in this case, and it could not have been shown, that the Employer, whose business and deliveries were in no way affected by the picketing, did in fact suffer any financial damage.

G. The fallacy in the Board's argument that minority picketing induces unfair practices by employers; an employer, even under the Board's hypothesis, commits an unfair practice only when it actually recognizes or bargains with a minority union, and minority picketing need not necessarily result in any such unfair practice.

Even though it be assumed under applicable decisions of the Board that an employer may commit an unfair practice in recognizing or dealing with a minority union (at least where another union is claiming a majority status), this is so only if *at the moment of* recognition or contract signing a majority of the employees have not been persuaded to join with the union. Since an employer is free to urge his employees to join the union, or to point out the advantages of collective bargaining, or otherwise to influence his employees in the matter of union membership so long as not resorting to threat of discharge or other retaliation in the process, the employer is not exactly helpless in the situation where he is confronted with minority picketing. Furthermore, he can ignore the picketing and any union demands made pursuant to the picketing, in the hope that, as happened here, there will be no economic loss or business disruption occasioned by the picketing, or in the hope that, in any event, any possible economic loss occasioned by the picketing would be more than offset by not having to meet union wages or conditions, and in the hope that the union will not be able to maintain the financial cost of picketing for any extended period. Finally, the employees themselves, at any time in the course of the picketing, may well be persuaded by the picketing and by the union appeals made to them to join with their fellow employees in the industry as union members. Thus, at any time during the

course of so-called "recognition" picketing, it might easily come to pass that a majority of the employees involved will, for one reason or another and without any illegal coercion by their employer or from any source, decide to select the picketing union as a bargaining representative, and unless the employer recognizes and bargains with the union prior to this time, no unfair labor practice is involved, even assuming that to extend such recognition has been proscribed. Accordingly picketing for recognition by a minority union, in and of itself, need not necessarily result in an unfair practice and cannot *per se* be considered a violation of the Act. And if the picketed employer actually does recognize and deal with the minority union, other direct methods are available to the "victimized" employees of the "pressurized" employer by way of filing charges and having any resultant agreement set aside and discriminations remedied, as pointed out by Member Murdock in his dissent (R. 59).

H. Until now the Board has consistently held minority picketing for recognition not violative of Section 8(b)(1)(A).

It is also significant that for nine years after the enactment of Section 8(b)(1)(A) no panel of the Board conceived that Section 8(b)(1)(A) could be used for purposes of restraining picketing by minority unions.

In 1948, after full consideration, the Board decided that the touchstone of illegality under Section 8(b)(1)(A) is, not the purpose to accomplish an "illegal objective," but "the *means* by which it is accomplished. . . ." *National Maritime Union*, 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954. And so the Board dismissed a complaint insofar as it alleged that, by a strike, picketing, and a wrongful refusal to bargain to secure an invalid hiring hall, the union violated Section 8(b)(1)(A) (*id.* at 982-987).[29] The same year the Board

[29] The conduct was of course illegal under Sections 8(b)(2) and 8(b)(3) of the Act.

decided *Perry Norvell Co.*, 80 NLRB 224, in which, again after full consideration, the Board held that in Section 8(b)(1)(A) "Congress was aiming at means, not end" (*id.* at 239). It therefore dismissed a complaint insofar as it alleged that the union violated Section 8(b)(1)(A) by *inter alia* striking to compel the recognition of a minority union (*id.* at 238-241). Until its abandonment in this case, the Board followed this interpretation without deviation.

Thus late in 1957 the Board overturns an interpretation adopted in 1948, within a year of the effective date of the Taft-Hartley amendments in 1947, and undeviatingly adhered to for nine years. Applicable here is the Supreme Court's condemnation of the attempt of the Interstate Commerce Commission to displace an administrative application of the Interstate Commerce Act apparently less than ten years old. Said the Supreme Court, "It would be difficult indeed to conceive a clearer case of uniform administrative construction . . ."; "all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons"; "At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation." *United States* v. *Chi. N. S. & Mil. R. Co.*, 288 U.S. 1, 13-14. See also, *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26; *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774-775; *United States* v. *Ryan*, 284 U.S. 167, 174-175. This is peculiarly true here where the overturned interpretation involves a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Assn's.*, 310 U.S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

IV

SECTION 8(b)(4)(C) OF THE ACT AND MORE LATELY, SECTION 8(b)(7), EXPRESSES THE SOLE EXTENT TO WHICH CONGRESS INTENDED TO REGULATE AS AN UNFAIR LABOR PRACTICE PICKETING BY A UNION OF AN EMPLOYER TO SECURE THAT EMPLOYER'S RECOGNITION OF IT AS BARGAINING REPRESENTATIVE.

Section 8(b)(4)(C) of the Act is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A) as made as of the time of its decision herein, just as Section 8(b)(7) is the key to the invalidity of its present interpretation made after the enactment of Section 8(b)(7). (The effect of the enactment of Section 8(b)(7) on the Board's present position will be discussed *infra*, Part V. By Section 8(b)(4)(C) Congress then expressed the sole extent to which it intended to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress has restricted such picketing for recognition only in the situation where *another* union has been *certified* by the Board as the representative of the employees. To prohibit picketing for recognition in any other situation, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

Thus, Section 8(b)(4)(C), newly enacted in 1947, provides that it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to work, "where an object thereof is":

> "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9."

Prohibiting inducement or encouragement of employees to strike of course forbids peaceful picketing directed to the employees to influence them to engage in a work stoppage.[30]

Equally clearly, however, to strike or picket for recognition is forbidden only where another union has been certified as the representative.[31] As the Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428):

> "It is to be observed that the primary strike for recognition (*without* a Board certification) is *not* proscribed." (Emphasis supplied.)

In virtually identical terms, the House Conference Report states (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547):

> "It is to be observed that the primary strike for recognition (*without* a Board certification) was *not* prohibited." (Emphasis supplied.)

Congress thus restricted itself to a single narrow area of recognitional activity, namely, "Strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union. . . ."[32]

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[30] *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 700-705.

[31] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428; 93 Cong. Rec. 1844, 1846, 4905, in 2 Leg. Hist. 981-982, 986, 1455; 93 Cong. Rec. 136; 5 *Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., 3161-62; 4 *Hearings before the Committee on Labor and Public Welfare, United States Senate, on S. 55 and S. J. 22*, 80th Cong., 1st Sess., 1905.

[32] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428.

Predecessor versions of Section 8(b)(4)(C) embraced much broader prohibitions. The House bill, as reported and passed,[33] and an early version of the Senate bill,[34] prohibited "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under Section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law." This proposal banned any recognition strike or picketing except where the labor organization was certified by the Board as the exclusive bargaining representative. In its ultimate evolution, this total ban of any recognition strike or picketing, except in support of the status of a certified union, was narrowed to its present form, which prohibits a recognition strike or picketing only if another union has been certified. Thus, instead of preconditioning the validity of a recognition strike or picketing upon the existence of a certification of the striking or picketing union, Congress did the reverse; it preconditioned the validity of such a strike or picketing solely upon the absence of certification of another union. As a matter of deliberate choice, therefore, except for the narrowly defined activity regulated by Section 8(b)(4)(C), Congress, at the time the Board decided this case, left unrestricted the right of a labor organization to engage in a recognition strike or picketing.

This was fully recognized and endorsed by the Joint Committee on Labor Management Relations. This committee, in the discharge of its function to study and investigate "the administration and operation of existing Federal

[33] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C), in 1 Leg. Hist. 79, 205; see also H. Rep. No. 245, 80th Cong., 1st Sess., 44; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59; both in 1 Leg. Hist. 335, 563.

[34] S. 360, 80th Cong., 1st Sess., Sec. 13(b) (January 27, 1947).

laws relating to labor relations" (Title IV, Sec. 402(7), Labor Management Relations Act, 1947), reported concerning strikes for recognition (Com. Print., Rep. No. 986, Part 3, 80th Cong., 2nd Session., 70-71):

> "Both the bills passed by the House of Representatives in 1947 [35] and early committee versions of the against a strike for a purpose for which the act provided an administrative remedy. Such a provision would have prohibited a strike for recognition, since the labor organization has available the certification processes of the Board. *The Taft-Hartley law's only limitation upon such strikes is that provided by Section 8(b)(4)(C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.*" (Emphasis supplied.)
>
> "*A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.* A number of instances have just been called to the committee's attention (hearings, p. 267)." (Emphasis supplied.)
>
> "Many labor organizations have enjoyed recognition by, and contracts with, employers without ever having been certified by the Board. The employers have not first required such unions to prove their majority status in an election conducted by the Board, being satisfied to rely upon a check of membership cards, Senate bill[36] contained some form of prohibition dues records, or other proof that they were the choice

[35] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii), in 1 Leg. Hist. 205-206.

[36] S. 360, 80th Cong., 1st Sess., Sec. 13(b)(2) (January 27, 1947).

of the majority of the employees. A union seeking to supplant one of these uncertified bargaining representatives may call a strike for such purpose without violating Section 8(b)(4)(C). This was the situation in the recent *Perry Norvel Co.*, Case (9-CB-3) [80 NLRB 225], in which an uncertified union held a contract with the employer and another union struck for bargaining rights."

"*Present law in no way limits the primary strike for recognition except in the face of another union's certification.* It has frequently been suggested that Section 8(b)(4)(C) should be broadened to cover the situations where another union has been recognized, or has a contract, and where the striking union has failed to win recognition at the ballot box. A fairly good case can be made for such an amendment. It would not go as far as the suggestion prohibiting strikes for purposes for which the law provides an administrative remedy, for the union seeking bargaining rights in an unorganized shop might still strike for it." (Emphasis supplied.)

"There are two factors which might be considered in connection with any further restrictions upon recognition strikes. The first is the time element involved in acquiring bargaining rights by the orderly procedure provided by the act. If the employer will not consent to an election, it now requires an average of 84 days to dispose of a representation case (hearings, p. 1138). It may be questioned whether or not the mere availability of an administrative remedy is sufficient to restrict the right to strike. Perhaps the remedy should be prompt as well as available."

"A second consideration arises out of the fact that Section 9(c)(3) limits elections to one in a given year. A labor organization which loses an election and strikes

for recognition the next day or the next week may be condemned for such action, but there may be equities militating against it having to wait a whole year. The situation may arise where some action by the employer, or a more successful organizing campaign, causes the union to acquire an overwhelming majority within a few weeks following an election in which it has been rejected by the employees."

"The committee believes that further experince with the act is advisable before consideration is given to broadening Section 8(b)(4)(C)."

The report thus recognizes that (1) "Present law in no way limits the primary strike for recognition except in the face of another union's certification"; and (2) "A labor organization may lose an election in which it was the only union on the ballot and the next day call a *legal* strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it." (Emphasis supplied.)

There can be no question of the validity of the report of the Joint Committee as an authoritative expression of the congressional purpose. This Court has relied upon it at least four times. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75, n. 14; *N.L.R.B.* v. *Lior Oil Co.*, 352 U.S. 282, 288 and n. 5, and concurrence at 299-300; *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 9, n. 15, and dissent at 14 and n. 3, 15, n. 7; *American Newspaper Publishers Association* v. *N.L.R.B.*, 345 U.S. 100, 108, n. 8. This Court has quoted with approval that report's observation that "Present law in no way limits the primary strike for recognition except in the face of another union's certification." *United Mine Workers* v. *Arkansas Oak Flooring Co., supra.* It has observed that "the Joint Committee of Congress [was] created by the very Act" which is the subject of its report "to study the operation of the federal labor laws." *N.L.R.B.* v. *Lion Oil Co., supra.* The Court of Appeals for the Sixth Circuit, after careful consideration

of the reasons for the creation of the Joint Committee and the circumstances of its operation (188 F. 2d at 921-924), considered its report "illuminating" (*id. at* 921) and "persuasive evidence" (*id.* at 923) of congressional intent. *N.L.R.B.* v. *Wiltse*, 188 F. 2d 912, 921-924 (C.A. 6), cert. denied, 342 U.S. 859. See also *Herzog* v. *Parsons*, 181 F. 2d 781, 788 (C.A.D.C.), cert. denied, 340 U.S. 810.

The report of the Joint Committee closed with the observation that "The committee believes that further experience with the act is advisable before consideration is given to broadening Section 8(b)(4)(C)" (*supra*, p. 13). Until 1959 experience had not led Congress to enlarge its scope.

In the period between 1948 and the present time, Congress has had a great deal of experience with the operation of Taft-Hartley in the field of recognitional picketing by minority unions which, until the present decision of the Board, had been a protected, not a prohibited, union activity. Until 1959 Congress refused to broaden the scope of Section 8(b)(4)(C), although in most every Congress since the Eightieth, bills to enlarge Section 8(b)(4)(C) and to prohibit minority picketing have been introduced but have not been passed. See, for instance, the following: H. R. 2032, 81st Cong., 1st Sess. (Jan. 31, 1949); H. R. 4811, 81st Cong., 1st Sess., Sec. 208(b)(2) (May 23, 1949); S. 249, 81st Cong., 1st Sess., Sec. 106(d) (Jan. 31, 1949); H. R. 1311, 83rd Cong., 1st Sess., Sec. 106(d) (Jan. 7, 1953); H. R. 3533, 83rd Cong., 1st Sess., Sec. 2(4) (Feb. 26, 1953); H. R. 216, 84th Cong., 1st Sess., Sec. 106(d) (Jan. 5, 1955); H. R. 1000, 85th Cong., 1st Sess., Sec. 106(d) (Jan. 3, 1957). A bill to like effect, but not identically worded, is H. R. 4914, 81st Cong., 1st Sess., Sec. 8(a)(4)(B) (May 31, 1949). See also S. Rep. No. 99, 81st Cong., 1st Sess., 59, 67-68, Minority Views 29; H. R. 4795, 83rd Cong., 1st Sess. (April 22, 1953); S. 1311, 83rd Cong., 1st Sess. (March 13, 1953).

These efforts to enlarge Section 8(b)(4)(C) were con-

tinued in the 1958 Congress where the precise subject of recognition and organizational picketing was again discussed by Congress at length, and where once again proposals to restrict such picketing were defeated. An elaboration of these efforts to enlarge the scope of Section 8(b)(4)(C) to include organizational picketing is enlightening. Among President Eisenhower's recommendations for new labor legislation, as set forth in his January 23, 1958, Message to Congress, was the following (41 LRRM 78, 81):

> "Amend the Act to make it an unfair labor practice for a union, by picketing, to coerce an employer to recognize it as the bargaining representative of his employees or his employees to accept or designate it as their representative where:
>
> The employer has recognized in accordance with law another labor organization;
>
> The employees, within the last preceding twelve months, have rejected the union in a representative election; or
>
> It is otherwise clear that the employees do not desire the union as their bargaining representative."

Immediately following the President's message, S. 3099 (January 23, 1958), H.R. 10248 (January 23, 1958), and H.R. 10273 (January 27, 1958) were introduced, and Section 4 thereof provided that Section 8(b) of the Taft-Hartley Act be amended to make it an unfair labor practice for a labor organization or its agents:

> "(1) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer with the object of forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative:

(A) where the employer has recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act, or

(B) where within the preceding 12 months a valid election under Section 9(c) of this Act has been conducted, or

(C) where the labor organization cannot establish that there is a sufficient interest on the part of the employees in having such labor organization represent them for collective bargaining purposes, or

(D) where such picketing has been engaged in for a reasonable period of time and at the expiration of such period an election under Section 9(c) has not been conducted."

In introducing S. 3099, Senator Smith explained with respect to this feature of it that (104 Daily Cong. Rec. 1137 (Jan. 30, 1958)):

> "The bill would also amend the National Labor Relations Act so as, *for the first time*, to deal specifically with organizational and recognition picketing. Such picketing has been generally criticized and there are many who would prohibit it completely. The bill would not do this but it would restrict picketing to force organization or recognition to situations where the employees in question have evidenced sufficient interest in having the union as their bargaining representative and even then would permit it only for a reasonable period of time within which a representative election would have to be conducted." (Emphasis supplied.)

But the bill which reached the floor of the Senate for a vote (S. 3974), entitled "Labor-Management Reporting and Disclosure Act of 1958," did not contain the Administration's proposed restriction upon recognition picketing. And so on June 12, 1958, Senator Smith introduced an amend-

ment to S. 3974 providing the identical limitation upon recognition picketing which he had theretofore introduced as S. 3099 (quoted above). 104 Daily Cong. Rec. 9897-98 (June 12, 1958). This was number one of eighteen amendments then introduced by Senator Smith on behalf of the Administration to correct alleged defects in S. 3974. *Id.* at 9902. In describing the amendment pertaining to recognition picketing, Senator Smith stated (*id.* at 9898):

> "The proposed amendment would restrict organizational or recognition picketing to those situations in which the union can show a sufficient interest on the part of the employees in being represented by it and would restrict the duration of such picketing to a reasonable period of time during which a representation election would have to be conducted to determine the employees' wishes as to a collective bargaining representative. The determination of sufficient interest and reasonable period of time would rest with the National Labor Relations Board."

But Senator Smith "decided not to bring up" this and other amendments "because of the obvious impossibility of their passage. These proposals of the administration will await further consideration at some future time." 104 Daily Cong. Rec. 10374 (June 17, 1958). In a statement of supplemental views, Senator Smith, together with Senators Goldwater, Purtell and Allott, noted that "We regret that no attempt was made to remedy the long-standing deficiencies and weaknesses in the present law. We refer to [among others] . . . organizational or recognitional picketing against the wishes of the employees. . . ." *Id.* at 10373. And in like tenor Senator Johnston stated, "But I think it is safe to say that Congress must in the future approach the questions of . . . organizational picketing among others. These have not been settled to the satisfaction of anyone. At the present time, we probably do not have enough information to settle them to the satisfaction of anyone." *Id.*

at 10374. The restriction upon recognition picketing having been rejected, S. 3974 then passed the Senate (104 Daily Cong. Rec. 10381 (June 17, 1958)), but it failed of enactment when the House declined to suspend the rules to vote upon it (104 Daily Cong. Rec. 16817, 16841 (August 18, 1958)).

The foregoing history of Section 8(b)(4)(C), both before and following its enactment up to 1959, makes it entirely clear that Congress has been willing to commit itself in the area of recognition picketing only to the limited extent of prohibiting such picketing when another union has been certified as the bargaining agent, and that Congress has refused to go further. Under such circumstances, the remarks of the Supreme Court of the United States in *United States* v. *International Boxing Club*, 348 U. S. 236, at p. 244, in respect to the significance of a similar attempt to extend the coverage of the anti-trust laws are applicable:

> " . . . No further action was taken on any of the bills: Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that 'Such a broad exemption could not be granted without substantially repealing the antitrust laws.' "

If the Board is correct in its 1957 interpretation of the Act as already prohibiting minority picketing for recognition, Congress apparently has been laboring in vain those many years until its recent action in 1959 to decide whether to enact into law this same prohibition. What actually happened, however, was that the present Board rushed in where Congress feared to tread and where all previous Boards have refrained from treading. The "balance" which the present Board has attempted to strike Congress

has already struck for itself; Congress has made the choice. That choice may be pleasing to some and not to others, but it is for Congress and not the Board to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363.

Section 8(b)(4)(C) of the Act, or, equally, the newly enacted section 8(b)(7), "has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Section 8(b)(4)(C) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to "a useless gesture."[37] We are therefore required to conclude, if we are to accept the Board's current interpretation of Section 8(b)(1)(A), that Section 8(b)(4)(C) and, as we will see, Section 8(b)(7) are idle collections of words. That conclusion is impermissible. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be

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[37] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430. Upon the expiration of the term of Member Murdock, who dissented in this and the companion *Curtis* case, Member Fanning was appointed to succeed him. Not having participated in the earlier *Curtis* decision, Member Fanning considered his position on this issue *de novo*, and concluded that the Board's current interpretation of Section 8(b)(1)(A) was an impermissible construction.

so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each." *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116.

To escape the force of this observation the Board's brief makes three meritless arguments. We turn to these.

(a) The Board brief argues that Section 8(b)(4)(C) prohibits a *majority* union from striking or picketing for recognition, even if the incumbent union has only minority support, so long as the incumbent's certification as the representative remains formally unrevoked; whereas Section 8(b)(1)(A) prohibits only minority strikes or picketing for recognition (Bd. br. pp. 32-33). But the view that Section 8(b)(4)(C) prohibits majority strikes or picketing for recognition in the face of an unrescinded certification of a minority union commands the assent of only two of the five members of the Board;[38] the Board itself has explictly reserved decision upon this question;[39] and the question is an unsettled and extremely troubling one.[40] Moreover, even if we accept the proposition stated in the

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[38] *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430, 42 LRRM 1195, 1196, n. 5.

[39] *District 50, United Mine Workers*, 106 NLRB 903, 906. See also, *Warehouse & Distribution Workers Union, Local 688*, 116 NLRB 923, 924; *Local No. 224, Allied Industrial Workers*, 116 NLRB 890, 892.

[40] The view expressed in the Board brief is in conflict with *Kennedy* v. *Warehouse Workers Union, Local 688*, 37 LRRM 2496, 2499 (D.C.E.D. Mo.). Of the four cases cited in the Board's brief at p. 33, n. 19, we read only *Parks* v. *Atlanta Printing Pressmen*, 243 F. 2d 284 (C.A. 5), cert. denied, 354 U.S. 937, as square support for the position stated in the Board brief.

Board brief, it hardly follows that this constitutes an adequate explanation of Section 8(b)(4)(C)'s reason for being. For, during the first year of its certification, a certified union is ordinarily conclusively deemed to possess majority status (*Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96), and thereafter it is presumptively deemed to possess majority status (*Celanese Corporation*, 95 NLRB 664, 672). It turns things upside down to find the true importance of Section 8(b)(4)(C), not in the protection it extends to the conclusive or presumptive majority status of the certified union, but in the supposed solicitude for the status of a minority union whose certification is formally unrevoked. "This suggested residue of utility left to 8(b)(4)(C) is . . . of little significance."[41]

(b) The second argument in the Board brief is this: for violations of Section 8(b)(4)(C), the temporary injunction procedures of Section 10(l) are applicable, whereas for violations of Section 8(b)(1)(A) those of Section 10(j) apply; that for violations within the purview of Section 10(l) the Board *must* seek a temporary injunction, while for those within 10(j) the Board *may* seek a temporary injunction; and that Congress differentiated between recognition strikes and picketing, placing those where another union was certified under Section 8(b)(4)(C) and others under Section 8(b)(1)(A), in order to make the 8(b(4)(C) violation "subject to the mandatory injunction feature" (Bd. br. p. 34).

This is a truly extraordinary explanation. Tying it in with the first explanation in the Board brief, it means that Congress intended it to be *mandatory* for the Board to seek a temporary injunction restraining *majority* strikes and picketing for recognition, if the incumbent was a minority union still possessing an unrevoked certification, but

[41] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430, 42 LRRM 1195, 1198.

that Congress left it *discretionary* with the Board to seek a temporary injunction restraining *minority* strikes and picketing where no certified union was in the picture! The truth is that the separate temporary injunction procedures have nothing to do with defining the scope of the substantive wrong. As the Board explained in *Perry Norvell Co.*, 80 NLRB 225, 240:

> "The General Counsel, to be sure, asserts that strike for recognition in the face of an outstanding certification of another labor organization is an unfair labor practice also under Section 8(b)(1)(A), as well as under Section 8(b)(4)(C), and that the latter section is not thereby rendered redundant. He argues that its purpose is merely to insure the expeditious handling of, and the immediate application for appropriate injunctive relief against, recognition strikes in the face of an outstanding certification. However, Section 8 does not deal with remedy. It is devoted solely to defining unfair labor practices by employers and labor organizations. It is Section 10(l) that deals with special remedies in strike situations under Section 8(b)(4)(C). If Congress had really intended Section 8(b)(4)(C) to have primarily a procedural effect, it would surely have inserted its terms in Section 10, rather than in Section 8."

Indeed, it is plain on the face of Section 10(l) that when Congress truly sought a differentiation in remedy, it said so in the remedy section, not by indirection in the substantive section. Section 8(b)(4) defines four substantive violations, (A), (B), (C), and (D). With respect to the first three, Section 10(l) specifies the procedure to be followed "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b)," including a mandatory application for a temporary injunction if there is reasonable cause to believe that a violation has been committed. The concluding sentence of Section 10(l) then

reads: "In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)." Thus, when Congress sought to make an application for a temporary injunction discretionary where, unlike subdivisions (A), (B), or (C), a subdivision (D) violation was charged, it expressed its purpose in the remedy section. It did not remove subdivision (D) from its position in Section 8(b)(4) and place it elsewhere in section 8(b). Neither did it insert subdivision (C) into Section 8(b)(4) in order to achieve a procedural end.

(c) Another argument in the Board brief is that, in particularizing in some of the later subsections of 8(b) conduct that is also covered by the more general language of 8(b)(1)(A), Congress was only following the established pattern of draftsmanship employed in Section 8(a), where subsequent subsections deal with specific forms of employer restraint and coercion prohibited in Section 8(a)(1). This is the sort of uncritical paralleling of Section 8(a)(1) and Section 8(b)(1)(A) which we have already discussed (*supra*, pp. 23-24). As the Court of Appeals for the Seventh Circuit held, "Nor can we agree with the contention . . . that a violation of other subsections of 8(b) are also necessarily violations of § 8(b)(1)(A) in the same manner that violations of other subsections of § 8(a) have been held to be violations of § 8(a)(1)." *American Newspaper Publishers Ass'n* v. *N.L.R.B.*, 193 F.2d 782, 801, cert. denied, 344 U.S. 812. For, "it is clear from the wording of § 8(b)(1)(A) that it is not a general clause which also prohibits the unfair labor practices described in subsequent paragraphs of subsection 8(b)." *Id.* at 806.

V

SECTION 8(b)(7), ENACTED IN 1959, INDICATES THE FULL EXTENT TO WHICH CONGRESS DESIRED TO REGULATE MINORITY RECOGNITION OR ORGANIZATIONAL PICKETING.

As stated in the Board's Brief, pp. 53-54, subsequent to the ruling of the court below, Congress amended the Act by adding a new unfair labor practice provision, Section 8(b)(7), which specifically proscribes the type of activity involved herein.[42] It is the position of the Respondent that the legislative history of Section 8(b)(7) establishes that the *Curtis* and *Alloy* doctrines are based upon improper interpretations of Section 8(b)(1) and, in any event, do not survive the enactment of Section 8(b)(7) in which Congress, after careful consideration and extensive debate, expressed its conclusions concerning the extent of the restrictions to be imposed upon organizational and recognition techniques.

The original Kennedy-Erwin bill, as reported to the Senate by the Labor Committee, contained no restrictions on organizational and recognition picketing and thus left intact the previous prohibition as set forth in Section 8(b)(4)(C).[43] In a minority report Senators Goldwater and Dirksen expressed their opposition to the Committee Bill as follows:

> ". . . the committee bill by completely ignoring recognition and organizational picketing by labor unions which do not represent a majority of the employees in the picketed enterprise, fails to provide the very protection of these employee rights which the Taft-Hart-

[42] The relevant provisions of the new Act are set forth in the Appendix to the Board's Brief, pp. 65-66.

[43] The Committee rejected an amendment offered by Senator Goldwater, which would have implemented the recommendations of the Administration on organizational and recognition picketing. 105 Cong. Rec. A8520 (October 2, 1959).

ley Act prescribes. By doing nothing to limit such picketing, the committee bill, in effect, permits employees to be restrained or coerced in their right to join or not to join a union, to select or refuse to accept a union as their collective-bargaining representative, as well as permitting an employer to be coerced into violating the law by forcing him to recognize a union which the majority of his employees do not wish either to join or to select as their bargaining representative, thus depriving them of the rights guaranteed to them by law."[44]

The Senate rejected an amendment to the Committee Bill offered on the floor by Senator McClellan in an attempt to deal specifically with the subject of recognition and organizational picketing in accordance with the recommendations made by President Eisenhower in 1958 and again in 1959. 105 Cong. Rec. 5951, 5961 (April 24, 1959). Then consideration was given to a less restrictive amendment proposed by Senator Prouty. 105 Cong. Rec. 5961-5976 (April 24, 1959). And finally the Senate adopted an even less restrictive amendment—a substitute to the Prouty amendment—which banned organizational and recognition picketing for nine months after a representation election and where another union had been certified or lawfully recognized by the employer. 105 Cong. Rec. 5976-5978 (April 24, 1959).

The House Bill represented a much stricter approach to the question. Its provisions barred organizational and recognition picketing (1) for twelve months following a representation election; (2) where another union was certified or lawfully recognized by the employer; (3) where picketing has continued for a reasonable time (not to exceed thirty days) and no election has been requested; and (4) the union cannot show 30% interest among the employees. H.R. 8400, 86th Cong., 1st Sess., Sec. 705(c); 105

[44] S. Rep. No. 187, 86th Cong., 1st Sess., p. 74 (minority views).

Cong., Rec. 13125 (July 27, 1959), 14519-14520 (August 13, 1959). With the exception of the proscription where a union cannot show 30% interest, the House provisions were adopted by the Conference Committee and appear in the Bill as finally approved. Conference Report, H. Rep. no. 1147, 86th Cong., 1st Sess., pp. 27-28.: Public Law 86-257, 86th Cong., 1st Sess., Sec. 704(c). It thus appears that Congress considered the whole gamut of possible legislative approaches to the question of organizational and recognition picketing, and by the enactment of Section 8(b)(7) struck what it considered to be a proper balance of the legitimate interests involved. And we submit that Congress would not have outlawed peaceful recognition picketing in certain specific set notions through the enactment of Section 8(b)(7) if Section 8 (b)(1) already contained the restrictions claimed by the Board.[45]

Nor does the savings clause of Section 8(b)(7) sustain the position that the more restrictive aspect of the *Curtis* and *Alloy* doctrines survive the enactment of Section 8(b)(7). As Professor Cox has reasoned, "It would seem wrong . . . to interpret the vague words of Section 8(b)(1) as a license for administrative and judicial construction of restrictions upon concerted activities as organizational techniques after Congress had sharply debated the issue and expressed its conclusions in Section 8(b)(7)."[46] Rather, the savings clause can be read "as a caveat intended to eliminate the risk that new Section 8(b)(7) would be taken to restrict the prohibitions upon secondary boycotts or jurisdictional disputes." *Ibid.*

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[45] It is also significant that the Board's ban on minority recognition picketing under Section 8(b)(1) would be indefinite and thus directly in conflict with the time-element provisions of Section 8(b)(7).

[46] "The Landrum-Griffin Amendments to the National Labor Relations Act," an Address by Archibald Cox, Royall Professor of Law, Harvard Law School before the Labor Law Section of the Minnesota State Bar Association on November 6, 1959.

By "recount[ing] the pertinent events" *(ibid.)*, Professor Cox, who served as advisor to Senator Kennedy, the Chairman of the Senate Labor Committee and Conference Committee, has clarified the ambiguous savings clause as well as the ambiguous sentence in the Statement of the Managers on the Part of the House, in the Conference Report that "Section 8(b)(7) overrules the Curtis and Alloy cases to the extent that those decisions are inconsistent with section 8(b)(7)" (H. Rep. No. 1147, 86th Cong., 1st Sess., p. 41). In his recent address, cited *supra*, Professor Cox explained:

> "The ambiguous sentence in the statute was not overlooked. On the part of the Senate the fear was expressed that it might keep alive the litigation over the *Curtis* and *Alloy* doctrines and thus lead to judicial and administrative restrictions in addition to those imposed by Section 8(b)(7). The answer disclaimed such an intent but the proponents of the Landrum-Griffin bill were unwilling to delete the sentence for fear that the deletion might somehow be construed to imply that Section 8(b)(7)-qualified Section 8(b)(4) or other unfair labor practices having nothing to do with the use of picketing or other publicity in an organizing campaign. The difference was resolved by the suggestion that the House Managers should include the following statement in their explanation of the Conference Agreement:
>
> > "The final sentence in proposed section 8(b)(7) is intended to make it clear that section 8(b)(7) does not qualify any of the other unfair labor practices under section 8(b). *Section 8(b)(7) is, of course, intended as a definitive legislative disposition of the problems involved in the Curtis and Alloy cases.*"

This passage was mimeographed on a sheet containing two similar passages compromising other issues, distributed and read aloud at a later meeting of con-

ferees with the staff present, and approved without dissent. The Statement of the House managers had not been prepared when the Senate voted. If was not shown to the Senate staff. Instead of the agreed explanation it contained the sentence quoted above. The sense would be the same if the actual Statement means that the court decisions in the *Curtis* and *Alloy* cases are overruled where inconsistent with Section 8(b)(7)." (Emphasis added.)

Notwithstanding Congressional hesitation for ten long years to legislate in the field of recognition and organizational picketing, and notwithstanding the fact that when Congress did choose to do so it legislated only in carefully prescribed areas, and with respect to certain specific situations, the Board, nevertheless, here asserts and has already taken the formal view in a recent decision (*Sierra Furniture Company*, 125 NLRB No. 20) that it still has the choice of using both Section 8(b)(1)(A) as well as Section 8(b)(7)—that it can use the shotgun as well as the carefully aimed rifle. Member Fanning, dissenting in *Sierra Furniture*, had this to say of the effect of the new Act:

> "Neither the proponents nor opponents of this provision of the new amendments were of the opinion that the then existing law proscribed such practices. Nor has there been any suggestion that the new amendments are merely declaratory of existing law. Indeed, the prohibition, under carefully prescribed circumstances, of organizational and recognition picketing is included in the amended Act, not as an amplification of Section 8(b)(1)(A), but in an entirely new subsection, 8(b)(7)."

There are only two judicial comments on the Board's position that, in spite of the enactment of Section 8(b)(7), it can continue to utilize Section 8(b)(1)(A) in the field of recognition and organizational picketing. In the recent case of *NLRB* v. *Teamsters, Local 182*, decided by the Court of

Appeals for the Second Circuit on November 27, 1959, 5 LRRM 2202, Judges Clark, Moore, and Smith disagreed with the Board's present position. They stated (45 LRRM at 2205):

"The Board found also that the peaceful picketing by the Union minority for recognitional purposes amounted to restraint and coercion of the employees in the exercise of the rights guaranteed in Section 7 (the right to join labor organizations or refrain therefrom). This is a troubled question. The Board for some years after the passage of the Act took the view that peaceful picketing for such purposes was not restraint or coercion within the meaning of 8(b)(1)(A). *Perry Norvell*, 80 N. L. R. B. 225. In a number of recent cases, however, it has swung over to the opposite conclusion. The courts have been divided in enforcement actions since the Board adopted its present view. The Court of Appeals for the District of Columbia recently rejected this view. *Drivers Local 639* v. *N. L. R. B.*, D. C. Cir., 1958, 43 LRRM 2156, 36 CCH Labor Cases 65,030 (Miller, *J.*, dissenting), certiorari granted (1959), 359 U. S. 965. The Court of Appeals for the Fourth Circuit, however, has adopted it. *N. L. R. B.* v. *United Rubber, etc. Workers Local 511*, 4 Cir., 269 F. 2d 694 (Sobeloff, J., dissenting). The legislative history is inconclusive, expressions by Senator Taft and others during the consideration of the legislation being cited by both sides of the controversy. Legislative History of the Labor Management Relations Act, Govt. Print. Off., 1948. Some of the confusion undoubtedly arises from the fact that the discussions centered largely around mass and other violent forms of picketing. II Leg. Hist. 1205-1206. In 1948 The Watchdog Committee interpreted the Act as limiting recognitional strikes in Section 8(b)(4)(C), but not otherwise. Senate Rep. 986, pt. 3, 80th Cong., 2nd Sess., pages 70, 71, 85, 87. All picketing has in it elements of coercion and restraint at least through the

solicitation of the support of public opinion even though the primary purpose may be to publicize to the employees the merits of the controversy. Yet if the Congress had intended to prohibit all organizational and recognitional picketing it would unquestionably have done so directly rather than indirectly as "coercion and restraint." This is borne out by its doing so in the limited class of recognitional picketing cases covered by 8(b)(4)(C) and by its recent action, following claimed abuses of such picketing, by limiting further the situations in which it may be used. In this troubled field we should be especially hesitant to anticipate Congressional action. The Congress is equipped to inform itself fully and carefully to develop governing legislation. We should proceed cautiously when urged to outrun the legislative mandate. *Rabouin* v. *N. L. R. B.*, 2 Cir., 195 F. 2d 906, 912. The original administrative construction, adhered to for some nine years, is bolstered by the action taken by the present Congress, in Pub. Law 86-257, 733 Stat. 519, Sec. 704 (c), which now makes it an unfair labor practice for a noncertified union to conduct peaceful picketing for recognitional purposes in certain situations under the Act, including that which existed here, where within the preceding twelve months a valid election under Section 9(c) has been conducted. It is plain from the wording of the subsection as a whole, that peaceful recognitional picketing was not considered to have been generally proscribed by 8(b)(1)(A), or the paragraph 8(b)(7) would have been unnecessary.

The Board's order in the case at bar is broader than the prohibitions of the new Section 8(b)(7), broad enough to prohibit picketing, more than 12 months after an election, where no other union has been lawfully recognized, and where the time for a petition under 9(c) has not run. The Board has attempted to go farther than the Congress later determined to go.

Since the Congress has now set the standards for the future, the precise question presented here is unlikely to recur. We do not have before us questions as to the precise scope and applicability of 8(b)(7) which will undoubtedly be decided in other cases on future records of findings as to activities after the effective date of the new Act. In the case at bar we consider the situation as it was prior to the new Act, and hold that 8(b)(1)(A) was not intended to proscribe the peaceful recognitional picketing at the plant of the primary employer in the manner found to have occurred here."

And in his dissenting opinion in *N.L.R.B.* v. *United Rubber Workers*, 269 F.2d 694, 702 Chief Judge Sobeloff of the Court of Appeals for the Fourth Circuit, stated as follows:

"I find further and even more persuasive evidence in the recent vigorous and extended Senate debate on the Kennedy-Erwin Bill. 105 Cong. Rec. 5951-5978. Both its proponents and opponents seem to have predicated the discussion upon the view that the present law has not proscribed these practices. The tenor of the arguments advanced by Senators who condemned such conduct was that there is a present need to amend the law to make these practices illegal."

VI

THE FREE SPEECH ASPECTS OF PICKETING AND THE PROTECTIONS THEREOF GIVEN UNDER SECTION 8(c) OF THE ACT REQUIRE THAT PICKETING NOT BE PROSCRIBED BY INTERPRETATION BUT ONLY IF EXPRESSLY COMMANDED BY CLEAR LANGUAGE IN THE ACT.

Even if Section 13 had not been written into the Act, it nevertheless would have to appear quite clearly in the language of the Act that Congress actually intended to proscribe the traditional union activity of minority picketing

for recognition before the Board could undertake to cut it down. This is so because, whatever the hybrid nature of picketing as embodying elements both of free speech and of inducement to action (*International Brotherhood of Teamsters, etc.* v. *Hanke, et al.*, 339 U.S. 470; *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769), picketing nevertheless continues to be the workingman's principal means of communication. (*Drivers Union* v. *Meadowmoor Co.*, 213 U.S. 287, at 293; *Thornhill* v. *Alabama*, 310 U.S. 88, at 95). As stated in *Carlson* v. *California*, 310 U.S. 106, at 112:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern . . . [publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

Thus, to the extent that peaceful picketing is an aspect of free speech, it is in a preferred position and must be presumptively favored as against assertions in doubtful cases that it has been proscribed. Restraint of picketing is the "exception rather than the rule" (*Bursyn* v. *Wilson*, 343 U.S. 495, at 503); it is to be "guarded with a jealous eye" (*A.F.L.* v. *Swing*, 312 U.S. 321; and in "borderline instances" the doubt is to be resolved in favor of freedom of speech (*Pennekamp* v. *Florida*, 328 U.S. 331, 347).

When fear was expressed that Section 8(b)(1)(A) was capable of expansive interpretation, Senator Taft stated that Section 8(c) would guard against it, observing that "the provision regarding free speech applies both to employer and employee."[47] Section 8(c) provides that:

> "The expressing of any views, argument, or opinion

[47] 93 Cong. Rec. 4020, in 2 Leg. Hist. 1023.

or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The Board contends that *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, is conclusive that Section 8(c) of the Act is inapplicable to this case. Precisely the contrary is true. That case holds only that the "general terms of § 8(c) appropriately give way to the specific provisions of § 8(b)(4)" (341 U.S. at 705-706). This conclusion was reached upon consideration of the specific words of Section 8(b)(4)—making it an unfair labor practice "to *induce or encourage* the employees of any employer"—the place of Section 8(b)(4) in the statutory scheme, and the purpose it was designed to serve. And in reaching this conclusion this Court *contrasted* the breadth of Section 8(b)(4) with the restricted reach of Section 8(b)(1)(A).

Thus, this Court stated that "The intended breadth of the words 'induce or encourage' is emphasized by their contrast with the restricted phrases used in other parts of § 8(b). For example, the unfair labor practice described in § 8(b)(1) is one 'to restrain or coerce' employees . . ." (341 U.S. at 703). In addition, the Supreme Court observed that to read Section 8(c) into Section 8(b)(4) would *duplicate* the reach of Section 8(b)(1)(A), for it would then limit the type of inducement reached by Section 8(b)(4) to that containing a "threat of reprisal or force or promise of benefit," the very limitation written into Section 8(b)(1)(A). Said the Court (341 U.S. at 701-702):

"To exempt peaceful picketing from the condemnation of § 8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce or encourage" are broad enough to include in them every form of in-

fluence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8(b)(4) defining the proscribed objectives, because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8(b)(1)(A)."

Thus this Court stated in so many words that Section 8(b)(1)(A) does not reach peaceful picketing; that to give Section 8(b)(4) meaningful scope it was necessary to read it to go beyond Section 8(b)(1)(A) so as to reach peaceful picketing; and that the difference between Section 8(b)(4) and Section (8)(b)(1) was that in Section 8(b)(4) Congress intended to reach picketing because of its purpose.

Thus this Court's decision in *Electrical Workers* confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section (8)(c) to guarantee its immunity.

The recent case of *Teamsters Local 795*, v. *Newell*, 345, U.S. 341, reversing *per curiam*, 181 Kansas 898, 317 P. 2d 817 is revealing. In that case, unlike the situation in *Building Service Union* v. *Gazzam*, 339 U.S. 532; *Pappas* v. *Stacy*, 151 Me. 36, 116 A. 2d 497; and *Teamsters Local* v. *Vogt, Inc.*, 354 U.S. 284, there was involved, as here, a situation in which the picketing in question was carried on pursuant to an original legitimate strike over the terms of a collective agreement, and where, as here, the striking union had lost its majority through the permanent replacement of the striking union members by strike-

breakers and non-strikers. The Kansas Supreme Court had sustained a temporary injunction prohibiting the striking union from "intimidating or coercing" the employer and his non-union employees through picketing of the employer's place of business. In respect to the picketing, the Kansas Supreme Court had stated:

> ". . . The purpose of this coercive picketing was to strangulate the appellee's business and it was no doubt the hope of the appellant Union that this would hasten appellee's recognition of the Union's demands. Coercive picketing is unlawful and contrary to the public policy expressed by the legislature of Kansas."

In reversing, this Court's *per curiam* decision merely cited as authority its holding in *Thornhill* v. *Alabama*, 310 U. S. 88. Since the *Newell* decision followed the decision of the Supreme Court in *Vogt*, *supra*, it appears that there is still considerable life in the picketing-as-free-speech pronouncements in *Thornhill*, at least where applied in a traditional field of labor activity and where only the immediate persons involved in a legitimate primary labor dispute are affected by the picketing.

VII

THE BOARD'S CURRENT APPROACH OVERLOOKS THE COMPROMISE CHARACTER OF THE TAFT-HARTLEY AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT.

In concluding that Section 8(b)(1)(A) broadly prohibits picketing to secure the recognition of a minority union, the Board has overlooked a vital element of the legislative process. "Legislation is often tentative, beginning with the most obvious case, and not going beyond it, or to the full length of the principle upon which its acts must be justified." Mr. Justice Holmes in *Beard* v. *Boston*, 151 Mass. 96, 97, 23 N.E. 826, 827. It is this "cautious advance, step by step, and the distrust of generalities which sometimes have been

the weakness, but often the strength, of English legislation." *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411. This approach is characteristic of the Taft-Hartley amendments to the National Labor Relations Act. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interest. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99-100. And so, in "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906, 912 (C.A. 2). The Board in this case has isolated a single principle, pushed it to a logical extreme, and reached a determination which Congress, fully aware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing. It is no part of the function of the Board to be "a super-Congress." *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686, 691 (C.A. 2), cert. denied 338 U.S. 954.

CONCLUSION

We conclude with the following pertinent remarks of the Trial Examiner in this case made in the concluding portion of his Report (R. 85):

> "If Congress wishes to sound the death knell to peaceful, recognition picketing by a minority because of the

economic pressures such picketing exerts on an employer, it of course, may do so, but it may not be done by administrative fiat. As the New York Court of Appeals stated in *Wood* v. *O'Grady*, 307 N.Y. 532; cert. denied 349 U.S. 939, 'It is axiomatic that we may not, under the guise of interpretation, import into a statute conditions or criteria which the legislature has been careful to omit.' See also *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355."

For the reasons set forth above it is respectfully submitted that the Order of the Board in the present case be set aside and the decision of the court below be sustained.

HERBERT S. THATCHER,
1009 Tower Building,
Washington 5, D. C.,

DAVID PREVIANT,
511 Warner Building
Milwaukee 3, Wis.
Counsel for Petitioner.